Vol. XVIII

TRANSCRIPT OF RECORD

(Pages 5322 to 5419)

Supreme Court of the United States

OCTOBER TERM, 1951

No. 428

PENNSYLVANIA WATER AND POWER COMPANY AND SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, PETITIONERS,

vs.

FEDERAL POWER COMMISSION ET AL.

No. 429

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PETITIONER,

vs.

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONS FOR CERTIORARI FILED NOVEMBER 16, 1951

CERTIORARI GRANTED FEBRUARY 4, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No.

PENNSYLVANIA WATER & POWER COMPANY AND SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, PETITIONERS,

vs.

FEDERAL POWER COMMISSION, AND CONSOLIDATED GAS, ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND, INTERVENORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[fol. 5383]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO MOTION TO POSTPONE DATE OF ORAL ARGUMENT, ETC.—Filed November 21, 1950

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6102

PENNSYLVANIA WATER & POWER COMPANY, a Pennsylvania Corporation, and Pennsylvania Public Utility Commission, Appellants,

vs.

CONSOLIDATED GAS, ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE, a Maryland Corporation, and Public Service Commission of Maryland, Intervener, Appellees

Appeals from the United States District Court for the District of Maryland, at Baltimore, Civil

(Argued June 26, 1950. Decided September 30, 1950.)

Before Parker, Soper and Dobie, Circuit Judges

James Piper, Wilkie Bushby and Charles E. Thomas (R. Dorsey Watkins, William J. Grove and Lloyd S. Benja- [fol. 5384] min on brief) for Appellants, and Harry N. Baetjer, Alfred P. Ramsey and Charles D. Harris (G. Kenneth Reiblich, Norwood B. Orrick and John Henry Lewin on brief) for Appellee.

SOPER, Circuit Judge:

The subject matter of this suit is a wholesale electric power agreement between Consolidated Gas, Electric Light & Power Company of Baltimore, a Maryland utility corporation, and Pennsylvania Water & Power Company, a Pennsylvania utility corporation. Penn Water seeks a declaratory judgment that the agreement is not a valid contract principally on the grounds that it violates the federal anti-trust laws and is contrary to the public policy and the laws of Pennsylvania.

Differences between the parties led Consolidated on September 1, 1948 to invoke arbitration provisions contained in Article X of the contract. Shortly thereafter, Penn Water instituted this suit and asked the court to declare that Article X is unenforceable and to enjoin Consolidated from proceeding with the arbitration. During the course of the proceeding, Penn Water notified Consolidated that it had terminated the agreement because of breaches on the part of Consolidated, and filed an amended complaint asking that the agreement be struck down in its entirety and also that the arbitration be enjoined.

Penn Water notified Consolidated that it would immediately cease to receive from Consolidated and pay for any electric energy generated in Maryland or the District of Columbia and transmitted to Pennsylvania, and that its opera- [fol. 5385] tions would be changed to effect this purpose. It declared that it would receive energy via its transmission lines for the limited purpose of delivery to the Pennsylvania Railroad; and announced that these changes would have no effect on the amount of electrical services rendered by Penn Water to Consolidated. Thereupon Consolidated applied to the court for a restraining order and on February 9, 1949 the court restrained Penn Water, pending the final determination of the issues, from doing anything in respect to the generation, transmission and disposition of power covered by the agreement between the parties in any manner different from the procedure theretofore followed in the performance of the contract. Thereafter Consolidated answered the amended complaint denying that the agreement is invalid for any reason, or that it had broken the agreement in any way, and asserted that the alleged breaches were proper subjects of arbitration under the contract.

The attorney for the Public Service Commission of Maryland was granted leave to appear on behalf of the Commission as intervener, and filed an explanatory statement of its position in support of Consolidated. The Pennsylvania Public Utility Commission intervened and charged that the contract between the two utilities is invalid because it constitutes a surrender of the powers and franchises of Penn Water to Consolidated without the approval of the Commission.

The court held that the contract was valid and that the

parties should proceed to arbitration and continued the restraining order in effect until the decision of this court on appeal.

Penn Water is a Pennsylvania utility corporation which was incorporated in 1910. It is the owner of hydro [fol. 5386] and steam electrical generating plants, capable of producing 104,000 kilowatts and 30,000 kilowatts respectively, at Holtwood, Pennsylvania, on the Susquehanna River. It also owns transmission lines, including those owned by its subsidiary, Susquehanna Transmission Company of Maryland, which connect with other utilities in Pennsylvania, Maryland and the District of Columbia. The area between the Potomac River on the southwest and the Hudson River on the northeast and south of the Pennsylvania-New York State line is interlaced with electric transmission lines connecting various utility systems. Penn Water's lines are interconnected with these systems which include the systems of Consolidated in Maryland and the Potomac Electric Power Company in the District of Columbia.

In 1910 Penn Water built two transmission lines from Holtwood to Baltimore, and subsequently added various other lines. Today there are in addition a transmission line running northeasterly from Holtwood to Coatesville for the supply of power to the Chester Valley Electric Company, now merged with the Philadelphia Electric Company; a transmission line running northwesterly from Holtwood to York to supply power to the Edison Light & Power Company; a transmission line from the hydro-electric plant of the Safe Harbor Water Power Corporation* at Safe Harbor on the Susquehanna, ten miles above Holtwood, to the western part of Baltimore; and a transmission line from Safe Harbor to the eastern part of Baltimore; an extension of the westerly one of these lines from Ellicott City, Maryland, to a point near the District of Columbia, to supply Potomac Electric, which serves the District of Columbia; and a transmis- [fol. 5387] sion line from Safe Harbor to Perryville, Maryland, along the eastern shore of the Susquehanna River which supplies power to the Pennsylvania Railroad at Perryville. That portion of these lines which is in Maryland

* This plant was built and is controlled by Consolidated and Penn Water.

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is owned by the Susquehanna Transmission Company of Maryland.

Penn Water sells its electric energy and services in bulk to five customers. It has a contract with Metropolitan Edison Company, which operates in the central and eastern part of Pennsylvania; a contract under which it supplies electric services to the Philadelphia Electric Company at Coatesville, which serves an area around Chester, Pennsylvania; a contract with Pennsylvania Power & Light Company for the supply of power in the Lancaster territory extending from the Maryland line north to Harrisburg and eastward to Reading. These three public utility companies are the Pennsylvania customers of Penn Water. In addition Penn Water has a contract with Consolidated to supply power and energy over transmission lines to Baltimore, and also in connection with another contract of the Pennsylvania Railroad. Most of the energy supplied to the Railroad is delivered from Safe Harbor to Perryville, but there is another source of supply to the Railroad in Washington. It will be seen that the greater part of the energy produced by Penn Water is sold at wholesale to four customers, while the remaining portion is sold at retail to the Pennsylvania Railroad as a consumer.

Prior to entering into the agreement in suit, Penn Water sold electricity at retail to the street system of Baltimore, which is now a customer of Consolidated; and also to an electric furnace company in Baltimore. The lines of Penn Water connect directly with those of Potomac Electric and it could sell and deliver electric power directly to Po- [fol. 5388] tomac Electric if it were not for its contract with Consolidated which now buys electric power from Penn Water and resells it to Potomac Electric.

Penn Water, in order to supplement its own supply of energy, buys energy generated by Consolidated, Metropolitan Edison, Pennsylvania Power & Light, and Philadelphia Electric for resale, and also buys through Consolidated energy generated by Potomac Electric.

Consolidated has four large steam generating plants with a capacity of 538,000 kilowatts and distribution facilities in and around Baltimore, and also has extensive transmission lines which connect with Penn Water's network of transmission lines and with the Bethlehem Steel Company's electric generating plant in the Baltimore area.

It thus appears that both Penn Water and Consolidated are engaged in the generation, transmission and sale of electric power and energy. Both companies have charter rights for the sale of electric energy to the public at wholesale or retail. Penn Water's charter rights are derived from the State of Pennsylvania, insofar as its lines in that state are concerned, and through the Susquehanna Transmission Company in Maryland it has similar charter rights to operate in Maryland, Consolidated has similar charter rights for the purchase and sale of electric energy in Maryland.

If it were not for the agreement between the parties which is the subject of this suit, the parties would be potential competitors in the generation and sale of electric energy through their present facilities or other facilities that might be constructed; and would also be potential competitors in the purchase of power from others for resale. The power re- [fol. 5389] quired by Potomac Electric to supply the wants of consumers in the District of Columbia could be purchased by Potomac Electric either from Consolidated or Penn Water and could be supplied by their present facilities or additional facilities that might be built, or by purchases from others. Similarly, Penn Water and Consolidated would be potential competitors for the supply of electric energy in and around Baltimore at wholesale or retail to customers with their present lines or an extension thereof to be approved by the public authorities.

The electric power which is now distributed in and near Coatesville, Pennsylvania, by Philadelphia Electric could be supplied from the facilities now owned or additional facilities to be built by Penn Water or could be supplied from the facilities of Consolidated.

The electric power which is now distributed in and near Coatesville, Pennsylvania, by Philadelphia Electric could be supplied from the facilities now owned or additional facilities to be built by Penn Water or could be supplied from the facilities of Consolidated.

Similarly, Penn Water and Consolidated would be potential competitors with respect to energy taken from Penn Water by Metropolitan Edison and Pennsylvania Fuel & Light which is used in York and Lancaster areas.

Penn Water and Consolidated would be potential competitors for the sale of power to Potomac Edison at Fred-

erick, Maryland, whose lines at that point are only a short distance from the lines of Penn Water so that they could easily be connected.

Free and unrestricted competition between the two utilities is, however, impossible by reason of their contractual relations. The basic agreement between them was made on June 1, 1931. For a number of years prior thereto Penn Water had supplied electricity to Consolidated. On December 31, 1927 the parties entered into an agreement covering the period from January 1, 1927 to December 31, 1970 for the cooperative use of their power resources and the sale of electric energy by Penn Water to Consolidated on [fol. 5390] a unit rate or calculated value of service basis. Thereafter the two companies cooperated in the financing and construction of a hydro-electric plant at Safe Harbor and on June 1, 1931 entered into two forty-nine year contracts. One of these contracts provided that Penn Water should buy one-third and Consolidated two-thirds of Safe Harbor's output. The other contract is the basic agreement in suit which altered substantially the prior arrangement between the parties. It provided that Consolidated should be entitled to all the electric capacity and energy available to Penn Water from its Holtwood plants and from Safe Harbor and not otherwise disposed of in the performance of existing contracts or new contracts entered into by Penn Water with Consolidated's approval or any obligation imposed upon Penn Water by its charter or by-laws. In return Consolidated agreed to pay to Penn Water an amount equal to the latter's operating expenses, a specified rate of return on existing facilities and a specified rate of return on the cost of new facilities, including an allowance for depreciation; and Consolidated was allowed a credit for the amount of the sales of energy by Penn Water to other persons. This agreement involved the payment by Consolidated of the annual sum of $2,832,259.75 for power and $355,146.73 for depreciation, which represented the revenue received by Penn Water in 1930 under the previous agreement, 10.25% per annum of the cost of plant additions between 1930 and 1938, and 9.5% per annum of the cost of additions after December 31, 1938. This annual payment was reduced by the sum of $600,000 under a supplemental agreement of September 29, 1939, pursuant to the request of the Public [fol. 5391] Service Commission of Maryland.

When this agreement was executed, Penn Water was receiving more than half of its revenue from consumers other than Consolidated and was selling them 40% of its energy. At the present time, more than 50% of this energy is sold to others than Consolidated and in 1948 Consolidated's payment amounted to less than 12% of Penn Water's operating revenue.

The restrictions which are imposed upon the activity of Penn Water by the agreement and give rise to the contention of invalidity are contained in Articles IV and V as follows:

> Article IV. So far as possible consistently with the performance of any duty or obligation to serve imposed on Power by its charter or otherwise by law, Power shall obtain the approval of Electric before entering into any agreement or agreements with any other person or corporation for the sale and/or purchase and/or interchange of electrical and hydraulic power and energy, or before making any substantial modifications in the existing contracts now in force between Power and its customers other than Electric.
>
> Article V. So far as possible consistently with the performance of any duty or obligation aforesaid, Power shall obtain the approval of Electric (1) before incurring any single commitment for investment (except for renewals or replacements) in excess of $50,000.00 on the basis of which Electric shall make payment under Article III(b) hereof, and (2) before alienating or disposing of in any one year any property, plant, or equipment, other than stores and construction equipment, having a total value in excess of $50,000.00 and included in the investments of [fol. 5392] Power and/or subsidiaries of Power in plant, property or power development devoted to the generation, transmission, or distribution of electrical power and energy.*

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* Article VIII of the agreement declares that it is the intent of the parties to encourage the maximum utilization of the resources of the parties by joint use of their property and equipment and by avoiding duplication of investment and unnecessary operating costs. For this purpose it is pro-

The basic agreement was not submitted to or approved by the Public Utility Commission of either Pennsylvania or Maryland before its execution. It was made possible by the close relationship between the two utilities, which grew out of the fact that both corporations were controlled by a group of stockholders of whom John E. Aldred, an important figure in the utility field, was the dominating personality. He and his associates acquired control of both corporations in 1910. He became president of both and both continued under his direction until his resignation in 1938. Thereafter the same close cooperation between the two corporations persisted until the retirement in 1946 of the officials who had participated with him in the formulation of his policies; but disagreements subsequently arose which culminated in the present litigation.

The District Judge found and it is not disputed that the effect of the quoted provisions of Articles IV and V of the contract is to confer upon Consolidated the power to control (1) the prices at which Power may sell its product; (2) the extent to which Power may extend its plant; (3) the territory [fol. 5393] in which Power may sell its product; and (4) the amount of back feed energy which Power must purchase from Consolidated.

We are in agreement with this interpretation of the contract. It expressly forbids plant expansion or development by Penn Water without Consolidated's consent; and also forbids the sale of electric energy by Penn Water without Consolidated's approval, and accordingly empowers Consolidated to fix Penn Water's prices. Hence the effect of the contract was to divide between two large power companies a

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vided that each party shall appoint one representative to serve on an operating committee to investigate and advise on operating matters and, in case of inability to agree, to submit the questions in dispute to the presidents of their respective companies.

Article X provides that if any dispute arises between the parties, it shall be referred to a Board of Arbitration consisting of one member to be chosen by each party and the third member to be chosen by the others with further provision for the selection of members of the Board of Arbitration in case of failure to act or disagreement, the determination of the Board to be final and conclusive.

trade territory wherein they would otherwise have been competitors; and to give one of them the power to fix prices for the other and to forbid plant expansion by the other, however beneficial to the other or to the public interest it might be.

Consolidated has actually exercised its restrictive powers in approving or disapproving Penn Water's contracts and by prohibiting Penn Water's proposals for plant expansion, notably, a proposal by Penn Water in 1948 for plant expansion at Holtwood whereby coal from the river could be salvaged and power economically produced. At the same time Consolidated erected a new steam plant for itself at Riverside, Maryland.

It follows that the contract is invalid because it violates Section I of the Sherman Act, 15 U.S.C.A. §1, which provides that every contract in restraint of trade or commerce among the several states is illegal. While the statute has been held to apply only to those restraints which are unreasonable in character, it has been repeatedly adjudged that price fixing agreements are unlawful *per se*. In *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221, 222, the court said:

> "* * Any combination which tampers with price structures is engaged in an unlawful activity. [fol. 5394] Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of

> any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike."

In *U. S.* v. *Masonite Corp.*, 316 U. S. 265, 276, it was also said:

> "* * Since there was price-fixing, the fact that there were business reasons which made the arrangements desirable to the appellees, the fact that the effect of the combination may have been to increase the distribution of hardboard, without increase of price to the consumer, or even to promote competition between dealers, or the fact that from other points of view the arrangements might be deemed to have desirable consequences would be no more a legal justification for price-fixing than were the 'competitive [fol. 5395] evils' in the Socony-Vacuum case."

See also *U. S.* v. *Paramount Pictures*, 334 U. S. 131, 143; *U. S.* v. *Real Estate Boards*, 339 U. S. 485, 489; *Norfolk-Southern Bus Corp.* v. *Va. Trans. Co.*, 4 Cir., 159 F. 2d 306.

So also does an agreement violate the statute which forecloses competitors from a substantial market since the statute is broken as well by the prevention as by the destruction of competition. *International Salt Co.* v. *U. S.* 332 U. S. 392, 396; *American Federation of Tobacco Growers, Inc.* v. *Neal*, 4 Cir., (July 29, 1950).

Similarly illegal is any agreement for the division of territory between competitors which in this case was effectuated by permitting Consolidated to determine to what customers and in what territory Penn Water might sell. *U. S. v. Aluminum Co.*, 2 Cir., 148 F. 2d 416; *U. S. v. Addyston Pipe & Steel Co.*, 6 Cir., 85 F. 271, 291.

The agreement is also violative of the Third Section of the Clayton Act, 15 U.S.C.A. § 14, insofar as it requires Penn Water's purchases of power to be approved by Consolidated from whom it purchases back feed or supplemental energy in order to meet the requirements of its outstanding contracts. Thereby Penn Water is prohibited from purchasing power from Consolidated's competitors. See *Standard Oil Co.* v. *U. S.*, 337 U. S. 293.

The contract is not one which involves the acquisition in legitimate business expansion of the plant of a competitor, such as was upheld in *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495, where the United States Steel Corporation acquired the assets of a large independent steel fabricator on the west coast. It was there found that the purchase would not unreasonably lessen competition and was not entered into with the [fol. 5396] intent to monopolize, and that therefore Sections I and II of the Sherman Act were not violated. The court held that so-called vertical integration is not illegal *per se*, but must be judged by its effect on competition, and the purpose for which the combination is entered into. The court said: (p. 522)

> "* * A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*. For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with non-members of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*."

In view of these well established rules, it is idle to consider the contentions of Consolidated that the contract was beneficial to the public and to the stockholders of Penn Water since it enabled Penn Water to meet its contractual obligations by supplementing its water power product at Holtwood by Consolidated's steam produced energy, and by guaranteeing to Penn Water stockholders a return on their investment; or that Consolidated was entitled to exercise the restrictive powers in order to protect itself from the risks involved in the obligation which it assumed to pay Penn Water's running expenses; or that the agreement was expressly designed to encourage the maximum cooperative utilization of their power and energy resources to the end that the joint use of their property and equipment should give the greatest practical benefit to the public [fol. 5397] and avoid duplication of investment and un-

necessary costs of maintenance, and thus contribute toward the rendition of a high standard of service. The decisions we have cited conclusively demonstrate that the prohibitions of the statute apply even though the parties to a contract indulge the belief that the agreement may have beneficial results and actually show that in some respects the public is benefited thereby. Congress has determined that the greater good is served by the maintenance of free competition and its decision in the field of interstate commerce must control. See *U. S.* v. *Aluminum Co.*, 2 Cir. 148 F. 2d 416, 426; *U. S.* v. *Reading Co.*, 226 U. S. 324, 326, 358.

It has been suggested that although regulated industries are not *per se* exempt from anti-trust laws,* the statutes do not have the same application to publicly regulated industries as they do to private enterprises and that in the actual situation existing in this case, the statutes were not violated. It is urged that the parties to the basic contract are not competitors in the same field since Consolidated sells its product mainly at retail to customers, while Penn Water sells electric power primarily at wholesale to Consolidated and other retail distributors, and has only one retail customer, the Pennsylvania Railroad Company which buys in large quantities. It is said that each utility has a legal monopoly in its own field and that there is no proof that the purpose or effect of the agreement has been to raise or fix unreasonably the prices of electric energy in the area served by the parties or that the customers have been deprived of [fol. 5398] any of the advantages of free competition.

This argument cannot be sustained. It does not give sufficient weight to the decisions, in which the anti-trust acts have been applied to utilities, or to the potential services which Penn Water might render to the public if it were relieved of the contractual restrictions upon its activities. It was held in *Georgia* v. *Pa. R. R. Co.*, 324 U. S. 429, in accord with many previous decisions, that railroad carriers are subject to the anti-trust laws although their rates are controlled by the Interstate Commerce Commission; and hence an agreement by carriers to fix rates may be illegal although the rates are reasonable; and that the agreement of a carrier to subject rates to the control of other carriers is in-

* *U. S.* v. *Borden Co.*, 308 U. S. 188; *Georgia* v. *Pa. R. R. Co.*, 324 U. S. 439.

valid since it deprives the carrier of the power to perform the duty imposed upon it to initiate its own rates. That is precisely the vice of the present contract. Penn Water has surrendered the right to propose its own rates, to extend its own plant, and to enter into new fields of activity; and it is impossible to say that the public interest has not been or will not be jeopardized by its failure to perform the duty to furnish adequate services at reasonable rates involved in its charter privilege to operate.

In short, the grant of monopolistic privileges, subject to regulation by governmental bodies, does not carry an exemption, unless one be expressly granted, from the anti-trust laws, or deprive the courts of jurisdiction to enforce them. This principle of law has been applied not only to public carriers, see U. S. Terminal W. Ass'n, 224 U. S. 383; *U. S.* v. *Reading Co.*, 253 U. S. 26; but in the insurance field, *U. S.* v. *Southeastern Underwriters Ass'n*, 322 U. S. 533, 559, 561; in the telephone field, *U. S. Tel. Co.* v. *Central Union Tele-*
[fol. 5399] *phone Co.*, 6 Cir., 202 F. 66; and also in the field of gas and electric energy, In re American Fuel & Power Co., 6 Cir., 122 F. 2d 223.* **

On this appeal Consolidated presents for the first time in this case the contention that the District Court was without jurisdiction to decide whether the basic agreement violates the Sherman Act because exclusive primary jurisdiction to determine that question has been conferred upon the Federal Power Commission by the Federal Power Act,† 16 U.S.C.A. §§ 791 to 825. That question was submitted to the District Court not only by the complaint of Penn Water but also by the answer of Consolidated, and the court

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* It may be noted in passing that the legal monopoly of a patent does not exempt the patentee from the provisions of the Sherman Act. *Williston on Contracts*, §1647; *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20; See, *U. S.* v. *General Electric Co.*, 272 U. S. 476, 485; *Standard Oil Co.* v. *U. S.*, 283 U. S. 163, 169.

** Since we reach the conclusion that the basic agreement is invalid on its face, we have not found it necessary to consider certain excluded evidence offered by Penn Water which tended to show that the purpose and effect of the agreement was to bring about an unlawful restraint of trade. Much of the evidence is documentary in character and should have

[fol. 5400] took jurisdiction of the issue with the express approval of both parties. Nevertheless Consolidated now contends that exclusive primary jurisdiction to consider the question was lodged in the Federal Power Commission by the statute.

Penn Water is subject to the Federal Power Act as a licensee under Part I of the Act, 16 U.S.C.A. §§791 to 823, and as a public utility under Part II of the Act, 16 U.S.C.A. §§824 to 824h. Under Section 4(g) of Part I of the statute the Commission has power to investigate and issue orders in the public interest to conserve and utilize

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been admitted insofar as it related to circumstances which occurred at or prior to the execution of the agreement, and tended to show its illegal purpose, or insofar as it pertained to acts of Consolidated which gave effect to that purpose. The evidence related to the period of Aldred's control. It tended to show that the purpose of the contract was to destroy the power of Penn Water to compete with Consolidated in case Penn Water should fall into unfriendly hands; that Consolidated refused to allow Penn Water to contract with the Potomac Electric Power Company in 1932 for the purchase and sale of power at wholesale; that in 1946, when differences between the parties occurred, Consolidated forbade Penn Water to enter into negotiations with the Philadelphia Electric Company for the extension of contracts between them; and in 1947 after Philadelphia Electric withdrew a notice of termination of its contract with Penn Water, Consolidated objected to the acceptance of this withdrawal; in 1947, when Metropolitan Electric was in need of larger supplies of power, Consolidated objected to Penn Water exercising an option to increase its power to furnish the supplies. Again in 1947 Consolidated directed Penn Water to terminate its contract with Pennsylvania Power & Light on the ground that the rates were too low. In 1947 Penn Water proposed an expansion of its transmission system to meet the needs of its Pennsylvania customers but Consolidated refused. During this period there was a great expansion of the facilities of other electric utility companies in the Pennsylvania area amounting to a total of $520,400,000 with no expansion by Penn Water or Safe Harbor at the same time.

†41 Stat. 1063, 49 Stat. 838.

power sites of the country. (16 U.S.C.A. §797(g)). It also has power under Section 4(e) to issue licenses upon certain conditions for the construction and maintenance of works for the development, transmission and utilization of power in bodies of water which are subject to the authority of Congress to regulate interstate commerce. (16 U.S.C.A. §797 (e)). These conditions are set out in Section 10, 16. U.S.C.A. §803 and include Section 10(h), 16 U.S.C.A. §803(h), which is as follows:

> *Monopolistic Combinations prohibited.*
>
> (h) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

Section 20 of the Act, 16 U.S.C.A. §813, provides that when power enters into interstate commerce, the rates charged and services rendered by a licensee shall be reasonable and non-discriminatory; and whenever any of the states directly concerned has not provided a commission to enforce [fol. 5401] this requirement within the state, or such states are unable to agree through their properly constituted authorities on the services to be rendered and the rates to be paid, jurisdiction is conferred upon the Commission to regulate and control services and rates.

Section 26, 16 U.S.C.A. §820, provides that the Attorney General may on request of the Commission or the Secretary of the Army proceed in equity in a District Court of the United States for the purpose of revoking any license for the violation of its terms or to prevent any act of commission or omission in violation of the statute; and the District Courts are expressly given jurisdiction over the proceedings.

Part II of the Act, Sections 201-209, 16 U.S.C.A. §824, authorizes the Commission to regulate the transmission of electric energy in interstate commerce and the sale of such energy at wholesale, provided such regulation shall extend only to those matters which are not subject to the regulation by the states. The duty is imposed upon the Commission to encourage the interconnection and coordination of facilities for the generation and sale of electric energy be-

tween regional districts which the Commission is empowered to set up; and the Commission may by order direct a public utility to establish physical connection of its facilities with the facilities of others engaged in the transmission or sale of electric energy. (Section 202(b), 16 U.S.C.A. §824a (b)). No public utility may sell, lease or dispose of facilities subject to the jurisdiction of the Commission without applying to it for authority so to do. (§203(a), 16 U.S.C.A. §824b(a)). All rates and charges for such transmission or sale of electric energy, as well as contracts which affect such rates or services subject to the jurisdiction of the Commis- [fol. 5402] sion, may be determined by the Commission. (§205(c), 16 U.S.C.A. §824d(c); (206(a), 16 U.S.C.A. §824e (a)).

Part III (§§300-320, 16 U.S.C.A. §825) relates to administrative and procedural matters. The Commission is given the duty to investigate complaints and power to investigate violations of the Act, and hold hearings. (§§307-8, 16 U.S.C.A. §§825 f, 825 g). It may issue orders and regulations to carry out the statutory provisions; (§309, 16 U.S.C.A. § 825 h); and persons aggrieved by any order may obtain judicial review in the Circuit Court of Appeals. (§313, 16 U.S.C.A. §825 L). Section 314, 16 U.S.C.A. §825 m, of the Act empowers the Commission to bring an action in the United States District Court to enjoin violations of the statute and to enforce compliance therewith, and further provides that the Commission may transmit evidence of illegal practices to the Attorney General who, in his discretion, may institute criminal proceedings under the Act. The District Courts of the United States are given exclusive jurisdiction of violations of the Act, or of rules or orders thereunder, and of all suits to enforce any duty created by the Act or enjoin any violation thereof. (§317, 16 U.S.C.A. §825 p).

It is contended that these enactments contemplate prior administrative determination by the Commission, and that until this action is taken, the District Courts do not have jurisdiction to revoke licenses under Section 26, 16 U.S.C.A. §820, or to restrain violations of the statute under Section 314, 16 U.S.C.A. §825m. It is also suggested that since public utilities like Penn Water were subject to the Sherman Act at the time that the Federal Power Act was passed, there could have been no other reason for the insertion of

[fol. 5403] the prohibitions of the Sherman Act in Section 10(h), 16 U.S.C.A. §803(h), except to shift the forum in which restraints of trade of public utilities could be ascertained and corrected, from the District Courts to the Commission.

The argument does not carry conviction. The prohibition against monopolistic combinations was included among the conditions upon which the Power Commission may issue licenses for the construction and maintenance of power projects—not to deprive the courts of jurisdiction to enforce the anti-trust acts, but to make it perfectly clear that no licensee can legally agree to limit output, restrain trade or fix prices. The condition was a reaffirmance of the Sherman Act and was designed to restrict rather than to enlarge the Commission's authority.

That the condition was not inserted in the Act to shift the forum for the trial of anti-trust questions affecting power companies from the District Courts to the Power Commission is shown by the failure of Congress to empower the Commission in Section 10(h), 16 U.S.C.A. §803(h), to entertain proceedings before it to enforce the condition against monopolistic combinations. This omission is in marked contrast with the authority expressly conferred upon the Commission in respect to all the other conditions of the license to take steps to make them effectual. For example, in Condition (a) which provides that the project shall be such as is best adapted in the judgment of the Commission to utilization and improve the waterway involved, the Commission is given authority to require modification of the plans and specifications.

It is true that Section 26, 16 U.S.C.A. §820, of the Federal Power Act empowers the Commission to take action when [fol. 5404] the terms of a license are violated, but the manner in which the Commission is directed to proceed makes it very clear in the light of decisions in analogous cases that Congress did not intend to oust the District Courts of jurisdiction over violations of the Sherman Act. The Commission's function is merely to request the Attorney General to institute suit to control the offending licensee and thereafter, if the Attorney General sees fit to act, the District Court has jurisdiction to determine whether the terms of the license have been violated and to apply the proper

remedy. This procedure, however, falls far short of making the jurisdiction of the District Court contingent upon prior administrative action of the Commission, and there is nothing in the section which contemplates that the Commission must first determine administratively whether the grounds of revocation exist before the Attorney General may institute proceedings against the offender. The Commission may request court action in a proper case and the Attorney General may comply or refuse in his discretion, but there is nothing to show that the Attorney General may not act upon his own motion precisely as he did before the statute was passed.*

The case is closely analogous to the decision in *U. S. Alkali Ass'n* v. *U. S.*, 325 U. S. 196, which related to the provisions of the Webb-Pomerene Act that exempted associations engaged in export trade from the prohibitions of the Sherman Act, provided the Association acted in accordance with [fol. 5405] certain conditions. The Federal Trade Commission was empowered to investigate if it had reason to believe that the activities of an export association were not in accordance with the provisos and, if violations of the Sherman Act were found, to make recommendations to the Association for readjustment of its business in accordance with law; and if the Association should fail to comply with the recommendations, to send the findings and recommendations of the Commission to the Attorney General for such action as he should deem proper. It was held that the exercise of these powers by the Commission was not a prerequisite to a suit by the United States against an export association to restrain violations of the Sherman Act. The court showed that the grant of power to the Commission did not repeal *pro tanto* the authority conferred upon the Attorney General by the Sherman Act to enforce its provisions and that although the Commission might render useful service by bringing violations to the attention of the Attorney General, the enforcement of the statute is in his hands and the Com-

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* The power conferred upon the commission by Section 825m to bring suit on its own initiative in the District Court to enjoin violations of the Federal Power Act or enforce compliance therewith obviously does not deprive the District Court of jurisdiction to enjoin complaints instituted by the Attorney General or other parties.

mission's authority is exhausted when it refers its findings to him. The court took notice of the fact that the provisions of the Sherman Act with reference to enforcement through the Attorney General were not expressly repealed by the Webb-Pomerene Act as to export associations and emphasized the principle that repeals by implication are not favored.

In *U. S.* v. *Borden Co.*, 108 U. S. 188, a similar decision was made. An indictment against certain producers and distributors of milk for violation of the Sherman Act was sustained notwithstanding the provisions of the Capper-Volstead Act whereby dairymen were authorized to act in concert in marketing their goods, and the Secretary of Agri- [fol. 5406] culture was authorized to determine, subject to judicial review, whether a cooperative corporation restrained trade to such an extent that the price of the product was unduly enhanced, and if so, to issue a cease and desist order. This procedure was held not to replace or prevent a criminal prosecution under the Sherman Act without prior action by the Secretary of Agriculture. See also *Hinton* v. *Columbia River Packers Ass'n*, 9 Cir., 131 F. 2d 88, where a similar construction was given to the statutes respecting Fishermen's Cooperatives, which empowered the Secretary of the Interior to issue cease and desist orders to any association which should seek to monopolize trade in any aquatic project. In these cases the principle laid down in *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, that one who seeks relief in equity must first exhaust his administrative remedy was held inapplicable.

The argument of the appellee completely ignores these decisions and rests principally upon *U. S. Navigation Co.* v. *Cunard S/S Co.*, 284 U. S. 474 and similar cases. That suit was brought by a shipping company in the United States District Court to enjoin a combination of shipping companies alleged to be engaged in monopolistic practices in violation of the anti-trust acts, and it was held that the court was without jurisdiction since Congress had afforded an exclusive remedy in a proceeding before the United States Shipping Board under the Shipping Act of 1916 and the Merchant Marine Act of 1920. Section 14(a) of the statute authorized the Shipping Board, upon its own initiative, or upon a complaint to determine whether any person had violated the prohibitions of the Act against rebates or un-

fair discrimination or the suppression of competition, and Section 22 empowered the Board to direct payment of repa- [fol. 5407] ration for injuries caused by violations of the Act. Jurisdiction to enforce the orders of the Board was conferred upon the District Courts by Sections 29 and 30. The court followed the line of decisions with respect to the preliminary jurisdiction of the Interstate Commerce Commission over carriers by rail and held that the case was remedied under the Shipping Act, and that the matter was within the exclusive primary jurisdiction of the Shipping Board and to that extent the anti-trust laws were superseded. Decisions in the kindred field of railroad transportation reach the similar result that complaints in respect to the rates and charges by carriers subject to the jurisdiction of the Interstate Commerce Commission must be submitted to the Commission for preliminary administrative action in order to give jurisdiction to the federal court. *Tex. & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156; *Terminal Warehouse Co.* v. *Penn. R. Co.*, 297 U. S. 500.

A comparison of the provisions of the Interstate Commerce Act and the Shipping Act, on the one hand, with the provisions of the Federal Power Act, on the other, demonstrate that the present case is ruled by the line of decisions of which *U. S. Alkali Ass'n* v. *U. S., supra,* is a notable example, rather than by the cases last cited. The maintenance of uniformity of regulation and the control of the activities of an industry of national scope by a specialized body are as important in the field of electric power as in the field of transportation by rail or water; but the control of the Federal Power Commission over the power sites of the country and over the interstate transmission of electric energy is not disturbed by the retention of the jurisdiction of the courts to enforce the anti-trust acts. Indeed the Federal [fol. 5408] Power Commission itself has indicated that in its opinion it possesses the power to regulate the rates for the transmission of electric energy by Penn Water in Pennsylvania to Consolidated in Maryland, and to maintain the interconnection of their facilities, even if the basic contract between them is invalid.*

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* Even if it should be held that the Federal Power Act requires a preliminary determination by the Federal Power

We are referred to four proceedings conducted by the Federal Power Commission in respect to the activities of Penn Water in which its relations to Consolidated and Safe Harbor were involved and the coordination of their facilities in the transmission of electric energy were approved. The first proceeding originated on September 2, 1938 in a show cause order of the Commission to compel Penn Water to take a license under Part I of the Act, and finally resulted in an issuance of the license after an unsuccessful appeal in *Penn. Water & Power Co.* v. *F.P.C.*, C.A.D.C., 123 F. 2d 155; see 2 F.P.C. 61, 4 F.P.C. 426. The basic agreement of 1931 had been on file with the Commission since January 13, 1936, as a rate schedule of Penn Water under Section 824d(c) of the Federal Power Act, but there was no mention of the agreement in the proceeding although the Commission in issuing the license stated that the project was best adapted to a comprehensive plan for developing the Susquehanna River for the use and benefit of interstate or [fol. 5409] foreign commerce.

The second and third proceedings involved investigations into the wholesale rates charged by Safe Harbor under a tripartite contract among Safe Harbor, Penn Water and Consolidated, which complemented the basic agreement of 1931. In the second proceeding the Commission issued an order reducing the Safe Harbor's rates, 2 F.P.C. 182; but the order was set aside on appeal in *Safe Harbor Water Power Corp.* v. *F.P.C.*, 3 Cir., 124 F. 2d 800, on the ground that the jurisdiction of the Commission was dependent upon the inability of the Maryland and Pennsylvania Utility Commissions to agree, which had not been shown. This

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Commission in order to clothe a District Court with jurisdiction to entertain a suit to revoke a license or enjoin an act of a utility in violation of the anti-trust acts, it would not necessarily follow that such a determination is necessary to give jurisdiction to the District Court in a case of this kind. The instant suit was not brought to enforce the anti-trust acts, but to secure a judgment declaring that the basic agreement violates these acts and is therefore void. See the Declaratory Judgment Act, 28 U.S.C.A., Section 2201. However, in view of the conclusions stated in our opinion, it is not necessary for us to determine the weight to be given to this distinction.

defect was cured in the third proceeding, 5 F.P.C., 221, and on appeal the rate order of the Commission was upheld. *Safe Harbor Water Power Corp. v. F.P.C.*, 3 Cir., 179 F. 2d 179. The activities of the interconnected systems were commended by the Commission as producing electric energy at the lowest cost as well as insuring reliability of service. The Commission described the provisions of the basic agreement in regard to the right of the Maryland Company to all the electric capacity of Penn Water not otherwise disposed of, the right of Penn Water to a supply of steam generated energy from Consolidated and the agreement of Consolidated to reimburse the Pennsylvania Company for its operating expenses, as well as a return on its investment. The restrictive provisions of the agreement were not mentioned and their legal validity was not discussed.

The fourth proceeding was instituted by the Commission to investigate the reasonableness and legality of the charges of Penn Water for wholesale energy sold to Consolidated under the basic agreement. Consolidated and both state [fol. 5410] commissions intervened. On January 4, 1949 the Commission filed its opinion and order reducing the rates, *In the Matter of Pennsylvania Water & Power Co.*, F.P.C. Docket No. IT-5915, opinion No. 173. An appeal from this order is now pending in the Court of Appeals of the District of Columbia. Penn Water filed a petition for rehearing alleging amongst other reasons that the basic agreement was null and void in that it violated the Sherman Act and Section 803(h) of the Federal Power Act, but this application was denied in an opinion filed on February 28, 1949, *In the Matter of Pennsylvania Water & Power Co.*, Docket No. IT-5915, opinion No. 173 A. In this opinion the Commission referred to the economies resulting from the combined power requirements of the three companies and referred to the basic contracts in the following terms:

> "By the terms of those contracts the installation of additional facilities by Penn Water is subject to approval by Baltimore Company, to assure coordinated planning and investment to meet the growing power needs of the system as a whole with resulting additional economies and consumer benefits.
>
> "The regional integration and coordination of facilities, the resulting economies, and the utilization

and conservation of natural resources thus achieved are precisely what was sought to be encouraged and fostered by the Federal Power Act and established as a part of the criterion of the public interest to be served by regulation thereunder (cf. Section 202 (a)). *If there are questions as to the legality of the foundation contracts which are in litigation, as Respondents' application for rehearing indicates, the validity of our order is not dependent upon the decision of those questions.* In our opinion and order we took care to leave the continuation of the opera-
[fol. 5411] tion of the integrated and interconnected system in full effect, merely changing the rates, as shown by our statement wherein we specifically stipulated that 'The present arrangement whereby sales to Pennsylvania customers are made on a firm basis on definite rate schedules whereas Baltimore Company takes what is left and assures Respondents of the recovery of all proper operating expenses, depreciation, taxes and a fair return, is the most practicable under the circumstances. That arrangement will, therefore, be continued with, however, such modifications as are necessary to accomplish the reductions mentioned above to Pennsylvania Power & Light, Philadelphia Company, Metropolitan Company and Baltimore Company.' (Italics supplied)

"Now, by the changes referred to in Penn Water's application for rehearing, all of the carefully built-up benefits of pool design, investment, construction and operation apparently are intended to be sacrificed by Penn Water. Penn Water's non-receipt of steam generated energy from outside Pennsylvania for sale to resale customers would destroy the pool economies under the established method of operation."

This view of expert government authority is entitled to respect and we do not venture to say that the physical connection of the facilities of the two utilities, and the interchange of electric power produced by water in Pennsylvania and by steam in Maryland is not a desirable utilization of their combined resources. Nor do we undertake to gainsay the view of the Commission that even if the restrictive con-

ditions of the basic contract are invalid, as to which the Commission expressed no opinion, it still has the duty and authority under the Federal Power Act to encourage and es-
[fol. 5412[tablish the interconnection of electrical facilities of regional districts if it finds that such action is necessary and appropriate in the public interest, and will not interfere with the lawful authority of the state commissions in respect to the generation and distribution of electrical energy in intrastate commerce. §§ 202, 202(a)(b), 16 U.S.C.A. §§ 824, 824a(a)(b).

We are brought by these considerations to the contention of the Pennsylvania Public Utility Commission, an intervener in this case, that the basic agreement is invalid not only because it violates the anti-trust acts but also because it disables Penn Water from performing its proper function as a public utility under the public utility laws of Pennsylvania. The regulation is based upon the provisions of Section 3 of the Public Service Company Law of Pennsylvania, approved July 26, 1913, Pamphlet Laws 1374,* which was in effect when the basic agreement was executed in 1931 and also upon Sections 202(d) and 202(e) of Public Utilities Law, approved May 28, 1936, 66 Purdon's Pennsylvania Statutes Ann. §1101 *et seq.* which are set out in the mar-
[fol. 5413] gin.**

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* Section 3. Upon like approval of the commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful * * *

(c) For any public service company to sell, assign, transfer, lease, consolidate or merge its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person.

** Section 202. *Enumeration of Acts Requiring Certificates.* Upon approval of the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful * * *

(d) For any public utility to dissolve, or to abandon or surrender, in whole or in part, any service, right, power, franchise, or privilege * * *

(e) For any public utility, except a common carrier by railroad subject to the Interstate Commerce Act, to acquire

There can be no doubt that the freedom of action of Penn Water as a public utility of the State has been and is restricted by the provisions of Articles IV and V of the basic agreement whereby Penn Water is required to get the approval of Consolidated before making any agreement for the purchase or sale of electric power or making any investment or disposition of any property in excess of $50,000. In other words, Penn Water's power to propose prices and improvements and extend its services has been surrendered to Consolidated, and there can be no doubt that this surrender amounts to a transfer *pro tanto* of its powers and franchises to the Maryland utility without approval of the Pennsylvania Commission in violation of the Pennsylvania statute.

Indeed such restrictions upon the freedom of a public utility cannot be sustained irrespective of statutory prohibition. It was so held in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, in considering a contract between two competing Baltimore gas companies which was made in 1884 prior not only to the Pennsylvania Public Utility Acts but also the Sherman Act of 1890. The companies agreed to sell their product at a fixed price which could not be changed except by mutual consent except that the larger company in case of competition on the part of another company might reduce its price. They also agreed that one of the companies should lay no more pipes for the supply of gas. In denying recovery upon the contract because of invalidity, the Supreme Court said (pp. 410-411):

> "It is also too well settled to admit of doubt and a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public [fol. 5414] accommodation or conveniences subservient to its private interests.
>
> "'Where,' says Mr. Justice Miller, delivering the opinion of the court in Thomas v. Railroad Co., 101

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from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service." * * *

U. S. 71, 83, 'a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State and is void as against public policy'."

See also *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 48, 51; *U. S. Tel. Co.* v. *Central Union Tel. Co.*, 6 Cir., 202 F. 66, 72, 73.

One of the most important duties of a public utility, inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions; and the utility is not relieved from this duty because its activities are subject to governmental regulation, for a regulatory commission is not clothed with the responsibility or qualified to manage the utility's business.* The decisions in respect to this matter, both before and after the establishment of regulatory commissions, are in accord [fol. 5415] with the principles laid down in *Gibbs* v. *Baltimore Gas Co., supra.* See *Arizona Grocery Co.* v. *A. T. & S. Fe Ry. Co.*, 284 U. S. 370, 384; *Ga.* v. *Pa. R. Co.*, 324 U. S. 439, 458-460; *U. S. Tel. Co.* v. *Cent. Union Tel. Co.*, 6 Cir., 202 F. 66, 71-2; see also *Magaha* v. *City of Hagerstown*, 95 Md. 62. The conclusion is inescapable that the contractual restrictions upon the power of Penn Water to perform its functions as a utility under the Pennsylvania statute are invalid.

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* "It must never be forgotten that while a State may regulate, with a view to enforce reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership." *S. W. Tel. Co.* v. *Pub. Serv. Comm.*, 262 U. S. 276, 289. See also *N. Pa. Power Co.* v. *Pa. P. U. C.*, 132 Pa. Super., 178, 333 Pa. 265.

This conclusion is not avoided by the fact that Penn Water is a public utility under Part II of the Federal Power Act, and subject as such to the regulation of the Federal Power Commission. There is, however, a limitation upon the jurisdiction of the Federal Power Commission over public utilities subject to Part II of the Federal Act, §§ 201 to 209, which is set forth as follows in Section 201(b), 16 U.S.C.A. 824(b), as follows:

> "(b) The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in sections 824-825r of this title, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the trans-
> [fol. 5416] mitter."

This langauage has been held to mean what it says. *Connecticut Light & Power Co.* v. *Power Commission*, 324 U. S. 515, 527; cf. *Jersey Cent. Power & Light Co.* v. *F.P.C.*, 319 U. S. 61; and hence there is a field in which the Pennsylvania Utility Commission is qualified to act. The evidence in this case shows that Penn Water is engaged in the production and local distribution of electrical energy to local utilities which distribute power to consumers in Pennsylvania, and in respect to this business, it seems clear that the state commission possesses regulatory power. The restrictive provisions of the basic agreement apply to all of the activities of Penn Water, including not only the transmission and sale of electric energy interstate but the local distribution within the State of Pennsylvania, and the surrender to Consolidated of Penn Water's duties obviously affects its local

as well as its interstate activities. Viewed in this light it is clear that the contention of the Pennsylvania Commission as to the invalidity of the basic agreement is well founded.

It is not our function in this case to decide how far the activities of Penn Water and Consolidated under the basic contract are subject to the regulations of the Federal Power Commission or the Pennsylvania Public Utility Commission, either or both. It has been held that the purchase by one Pennsylvania utility of the securities of another must be approved by both commissions. See *N. Pa. Power Co.* v. *Pa. P.U.C.*, 132 Pa. Super. 178, 333 Pa. 265. It may well be, although the present arrangement between the Maryland and Pennsylvania utilities is invalid for the reasons set forth, that an interconnection of facilities and an interchange of electrical energy between them may be continued [fols. 5417-5457] by some method that would meet with the approval of the appropriate regulatory authority and will not offend either the anti-trust laws or the utility laws of Pennsylvania. That question is not before us. We hold merely that the benefits that have heretofore flowed from the basic contract do not protect it from the impact of the Sherman Act; and that the contract is invalid since it violates that statute and disables Penn Water from performing its proper function as a public utility under the public utility laws of Pennsylvania; and that the District Court had jurisdiction in the premises.

In view of these conclusions we have not found it necessary to consider the contentions of Penn Water that the basic agreement was beyond the powers of Penn Water under the Pennsylvania law, or that Penn Water has properly terminated the agreement because of breaches thereof by Consolidated.

The case will be remanded to the District Court with instructions to enter a declaratory judgment in accordance with this opinion.

Reversed and Remanded.

[fol. 5458] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

EXHIBIT "A"—TO MOTION TO SET ASIDE ORDERS OF THE FEDERAL POWER COMMISSION, ETC.—Filed December 29, 1950

UNITED STATES COURT OF APPEALS.
FOR THE FOURTH CIRCUIT

No. 6102

PENNSYLVANIA WATER & POWER COMPANY, A Pennsylvania Corporation, and Pennsylvania Public Utility Commission,
Appellants,

vs.

CONSOLIDATED GAS, ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE, A MARYLAND CORPORATION, and PUBLIC SERVICE COMMISSION OF MARYLAND, Intervener,
Appellees.

MANDATE

Baltimore, Maryland

Oct. 27, 1950, order staying mandate pending application in Supreme Court for writ of certiorari filed.

Dec. 14, 1950, certified copies (2) of orders denying petitions for writs of certiorari filed.

[fol. 5459] [File endorsement omitted]

UNITED STATES OF AMERICA, ss:
The President of the United States of America:

[SEAL — UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT]

To the Honorable Judge of the United States District Court for the District of Maryland.

GREETING:

WHEREAS, lately in the United States District Court for the District of Maryland, before you or some of you, in a cause between Pennsylvania Water & Power Company, A

Pennsylvania Corporation, 16th Floor Lexington Building, Lexington and Liberty Streets, Baltimore, Maryland, Plaintiff, and Consolidated Gas, Electric Light and Power Company of Baltimore, A Maryland Corporation, 19th Floor Lexington Building, Lexington and Liberty Streets, Baltimore, Maryland, Defendant; Civil No. 4179; wherein the Pennsylvania Public Utility Commission and Public Service Commission of Maryland were allowed to intervene; and wherein the judgment and order of the said District Court, entered in the said cause on the 18th day of March, 1950, as in the words following, to-wit:

"This Court by its order of September 20, 1949 made pursuant to this Court's opinion rendered the same day, having determined (1) that the only question subject to determination by this Court was the validity of the so-called basic agreement of June 1, 1931 and (2) that if the basic agreement is valid, then all other questions raised by the Amended and Supplemental Bill of Complaint are subject to arbitration under Article X of the agreement; and the issues of validity having subsequently been heard in open [Vol. 5460] court and considered upon the evidence, oral argument and briefs, now, for the reasons and upon the findings of fact and conclusions of law set forth in the Court's written opinion filed February 28th, 1950, it is

"ORDERED AND ADJUDGED, this 18th day of March, 1950, that:

"1. The Agreement between Consolidated Gas Electric Light and Power Company of Baltimore and Pennsylvania Water and Power Company which is made up of the following instruments:

"Agreement as of December 31, 1927, Supplemental Agreement as of December 27, 1928, Supplemental Agreement as of June 1, 1931 (the Basic Agreement), and Supplemental Agreement as of September 29, 1939,

is a valid contract in accordance with its terms.

"2. The parties shall in due course proceed to arbitration of the issues listed in the Defendant's Notice of Arbitration of September 1, 1948.

"3. All prayers for relief contained in the Amended and Supplemental Complaint are denied and said Amended and Supplemental Complaint is dismissed; however, the temporary restraining order granted by this Court on February 9, 1949, shall remain in full force and effect until the final determination of the questions raised by the Amended and Supplemental Bill of Complaint, that is, until the final appellate decision with respect to this order and to all other orders of this Court heretofore passed in this proceeding and from which an appeal has been or shall be preferred and until the final determination of the issues listed in Defendant's Notice of Arbitration as of September 1, 1948, and which by its order passed on the 20th of September, 1949, this Court held to be subject to arbitration, including the final appellate decision with re-
[fol. 5461] spect to any appeal, if an appeal there be and it be prosecuted, from the award of the arbitrators. And it is further ordered that the right is hereby reserved to any party to this cause to make application for a further order modifying, supplementing or dissolving said restraining order.

WILLIAM C. COLEMAN
Chief Judge
U. S. District Court."

as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Fourth Circuit, by virtue of the appeals of the said Pennsylvania [illegible]er & Power Company, A Pennsylvania Corporation, [illegible]Pennsylvania Public Utility Commission, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the term of June, in the year of our Lord one thousand nine hundred and fifty, the said cause came on to be heard before the said United States Court of Appeals for the Fourth Circuit, on the said record, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment and order of the said District Court appealed from, in this cause be, and the same is hereby, reversed with costs; and that

this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, [fols. 5462-5583] at Baltimore, with instructions to enter a declaratory judgment in accordance with the opinion of the Court filed herein.

JOHN J. PARKER
Chief Judge, Fourth Circuit.
MORRIS A. SOPER
U. S. Circuit Judge.
ARMISTEAD M. DOBIE
U. S. Circuit Judge.

Endorsed:

"Filed and Entered
September 30, 1950.
Claude M. Dean Clerk,
U. S. Court of Appeals for
the Fourth Circuit."

You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion and the decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

WITNESS the Honorable FRED M. VINSON, Chief Justice of the United States, the 14th day of December, in the year of our Lord one thousand nine hundred and fifty.

CLAUDE M. DEAN
Clerk of the U. S. Court of
Appeals for the Fourth Circuit.

Costs of appellants:

Docketing Fee $25.00

Plus cost of printing briefs and appendices at not exceeding $1.50 per printed page.

[fol. 5584] IN THE
UNITED STATES COURT OF APPEALS

No. 10,236

PENNSYLVANIA WATER & POWER COMPANY and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 10,239

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

FEDERAL POWER COMMISSION
Respondent.

No. 10,531

PENNSYLVANIA WATER & POWER COMPANY and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

PARTIAL REPLY TO ANSWERS TO PETITIONERS' MOTION TO SET ASIDE ORDERS OF THE FEDERAL POWER COMMISSION, ETC.—Filed January 15, 1951

To the Honorable the Judges of the United States Court of Appeals for the District of Columbia:

In the Court's Order of December 19, 1950, fixing times for the Petitioners to file motions and supporting briefs and for Respondent and Intervenors to answer and for

other purposes, no provision was made for the service by Petitioners of reply briefs in connection with [fol. 5885] such motion. Consequently, counsel will on oral argument make such reply as seems appropriate to the arguments contained in the brief of the Staff of the Federal Power Commission, Respondent, and the joint brief of the Public Service Commission of Maryland and the Consolidated Gas Electric Light and Power Company of Baltimore, Intervenors.

However, in such briefs, counsel for Respondent and Intervenors interpret the Opinion of the United States Court of Appeals for the Fourth Circuit in the Case 6102, *Pennsylvania Water & Power Company* v. *Consolidated Gas Electric Light and Power Company of Baltimore, et al.*, as holding invalid only Articles IV and V of the contract between those Companies, dated June 1, 1931. On a Motion to Interpret Mandate, decided, with Opinion, on January 10, 1951, the Court of Appeals directed the District Court to issue a declaratory judgment, among other things, "declaring that the agreements of December 31, 1927, June 1, 1931 and September 29, 1939 are void and of no effect". In view of the fact that this Opinion disposes of the question of interpretation of said contract as urged by counsel for Respondent and Intervenors and that the Opinion will not be available in the official reports at the time of the argument in these proceedings, a copy of such Opinion as transmitted to counsel by the Clerk of the Court is printed and filed herewith.

Respectfully submitted,

RANDALL J. LEBOEUF, JR.,
CRAIGH LEONARD,
WILKIE BUSHBY,
RAYMOND SPARKS,
Counsel for Petitioners.

January 15, 1950.

[File endorsement omitted.]

[fol. 5586] IN UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6102

PENNSYLVANIA WATER & POWER COMPANY,
a Pennsylvania Corporation,

and

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants,

versus

CONSOLIDATED GAS, ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE, a Maryland Corporation,

and

PUBLIC SERVICE COMMISSION OF MARYLAND, *Intervener, Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

ON MOTION OF APPELLANTS TO INTERPRET MANDATE—Filed January 15, 1951

(Argued January 6, 1951. Decided January 10, 1951.)

Before PARKER, SOPER and DOBIE, Circuit Judges.

Wilkie Bushby and Charles E. Thomas (James Piper, R. Dorsey Watkins, William J. Grove and Lloyd S. Benjamin on brief), for Appellants, and Alfred P. Ramsey, Harry N. Baetjer and Charles D. Harris (G. Kenneth Reiblich, Norwood B. Orrick and John Henry Lewin on brief), for Appellees.

[fol. 5587] SOPER, Circuit Judge:

By a decision rendered upon the appeal in this case on September 30, 1950, we reversed the judgment of the District Court and held that an agreement for the sale and delivery of electric energy by Pennsylvania Water and Power Company, a Pennsylvania corporation, to Consolidated Gas, Electric Light & Power Company of Baltimore, a Maryland corporation, is invalid in that it violates the federal anti-

trust laws and is contrary to the public policy and laws of Pennsylvania; and the case was remanded to the District Court to enter a declaratory judgment in accordance with our opinion. Thereafter a controversy arose in the District Court as to whether the invalidation of the agreement revived an earlier agreement between the parties for the interstate sale and delivery of electric energy and entitled Consolidated to continued deliveries by Penn Water, in accordance with the terms set forth therein; and by motion of Penn Water we were asked to interpret the mandate of this court and settle the controversy. The matter was accordingly set for hearing, briefs were filed and counsel for the parties were heard at length.

The invalid agreement, which has been called the "basic agreement" throughout this litigation was executed on June 1, 1931. In effect it superseded an earlier agreement of December 31, 1927 for the sale of electric energy from January 1, 1927 to December 31, 1970, which Consolidated now desires to reinstate. There were in fact four agreements in this series between the parties as follows: Agreement of December 31, 1927; Supplemental Agreement of December 27, 1928; Supplemental Agreement of June 1, 1931; and Supplemental Agreement of September 29, 1939. Little need be said of the agreement of December 27, 1928 and the agreement of September 29, 1939, since they have no bear- [fol. 5588] ing on the point in issue. The agreement of December 27, 1928 transferred title to nine cables in Baltimore City from Penn Water to Consolidated in consideration of the payment of $105,000. This transaction was finally settled and closed and there is no attack upon its legality. The agreement of September 29, 1939, which was made at the request of the Public Service Commission of Maryland, reduced by $600,000 the annual payments of Consolidated to Penn Water under the 1931 agreement, as well as the amounts to be paid by Consolidated with respect to plant additions by Penn Water after December 31, 1938. There is no controversy about these provisions and the agreement throws no light upon the matter in dispute.

Attention may therefore be confined to the 1927 and 1931 agreements. The 1931 agreement is spoken of as supplemental to that of 1927, but in fact the later agreement took the place of the earlier one so completely that it has governed the relations between the parties for the past twenty

years and has been uniformly considered and called herein the "basic agreement" between the parties. It is of great significance that prior to the decision of this court on appeal and the refusal of certiorari by the Supreme Court it never occurred to any one to suggest that if the 1931 agreement were stricken down, the 1927 agreement would spring into life. Indeed the opposite assumption has been made. Heretofore Consolidated at no time made the contention that even if the 1931 contract were invalidated the 1927 agreement would remain in effect; and no such contention was made in the District Court, as appears from the concluding paragraph of its opinion where it was suggested that the invalidation of the basic agreement would enable Penn Water to withdraw completely from the interstate transportation and sale of electric energy.
[fol. 5589] It is obvious that this common assumption of the parties rather than the afterthought of Consolidated presents the true situation prevailing between the parties and the only reasonable answer to the question before the court. A comparison of the provisions of the two agreements clearly shows the correctness of this conclusion, because the 1931 agreement made such fundamental changes that thereafter it completely dominated the interparty transactions. In 1927 Penn Water agreed to sell approximately 400,000,000 kwh of 25 cycle electricity annually to Consolidated until 1970, and Consolidated agreed to pay for it on a unit rate basis. It was an ordinary utility contract for the supply of capacity and energy on a unit rate basis and placed no restrictions on Penn Water's operations.

The 1931 agreement, on the other hand, provided that Consolidated should be entitled to all the electric capacity and energy available to Penn Water and not otherwise disposed of in the performance of existing contracts, and in consideration thereof, Consolidated agreed to pay Penn Water an amount equal to its operating expenses, a specified rate of return on existing facilities, and on the cost of new facilities less depreciation, and Consolidated was allowed a credit for the amount of the sales of energy by Penn Water to other persons. Closely associated with these provisions were the illegal restrictions on the future activities of Penn Water which resulted in the invalidation of the whole contract. Therein Penn Water was required to obtain the approval of Consolidated before entering into any agree-

ment for the sale or purchase of electric power and energy and to obtain the approval of Consolidated before making any investment or disposing of its property having a value in excess of $50,000. These restrictive conditions were included in order to safeguard Consolidated in the perform-
[fol. 5590] ance of its promises and it is conceded that without them the contract would have been impracticable and would not have been made. When the sweeping nature of these changes is considered with the fact that they have controlled the business transactions between the parties for twenty years, it is easy to understand why the contract of 1931 has been treated as the basic agreement and the 1927 agreement has been given little thought.*

It is true that the 1931 contract grew out of the prior contractual relationship between the parties and in that sense was supplemental to the 1927 agreement. Indeed the latter document contains the seed from which the subsequent illegal transaction has grown. It recited the prior sales of electric energy to Consolidated and the express purpose to broaden the scope of the cooperative use of the resources and facilities of the parties so as to benefit the public and avoid unnecessary duplication of investment, and it declared that no major investments affecting facilities should be undertaken by either party without informing the other and granting it under equal conditions the position of preferred customer or seller, as the case may be.

The 1931 agreement referred to those recitals and declared it to be the intent of the parties to accomplish a more complete coordination by the sale to Consolidated of all Penn Water's power and energy available for sale and by paying therefor on the basis of an annual charge sufficient to yield an equivalent revenue to that theretofore received by Power plus a reasonable income on its additional investments there-
[fol. 5591] after made. Obviously it was the intent of the parties to abandon the old relationship and to accept a new

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* The 1931 agreement states that it supplements the agreement of 1927 and reaffirms the consistent provisions thereof; but a comparison of the documents shows that all of the substantial parts of the earlier agreement have been supplanted in the latter leaving only incidental provisions that do not affect the conclusions herein reached.

one and in furtherance of this purpose, to consolidate and merge the two agreements in one, the later agreement supplanting the earlier in all substantial respects and becoming the guide for their future actions. Unfortunately, in carrying out this purpose, Penn Water gave up its independent status as a producer and seller of electric energy and subjected itself so completely to the dominance of Consolidated as to violate the controlling statutes and hence the 1931 agreement must be stricken down. With it must also go the 1927 contract even though it be assumed to be lawful in its inception, for it is obvious that the parties never intended in any event to go back to their early relation. Indeed it would be unjust after the long lapse of time to require them to do so. Consolidated, having broken the law, is in no position to ask the relief of this court. See Virginia Dare Transp. Co. v. Norfolk Southern Bus Corp., 4 Cir., 176 F. 2d 354; Reynolds Metals Co. v. Metals Disintegrating Co., 3 Cir., 176 F. 2d 90; Duane v. Merchants Legal Stamp Co., 231 Mass. 113, cert. denied 249 U. S. 613.

The case here is not one where there has been merely an invalid amendment of a prior valid contract. If it were, there would be force in the suggestion that the declaration of invalidity of the amendment leaves the original contract in force. Here the prior contract has been merged in and its nature changed by the subsequent unlawful agreement, and as so changed, it has resulted in an unlawful relationship which has continued for twenty years. When the illegality of such relationship is declared, it is idle to contend that the court can withdraw the original contract from the illegal relationship and give it validity, certainly after it [fol. 5592] has been buried therein for so long a period. It must perish along with the relationship of which it has been made an inseparable part.

We repeat, as we said in our opinion, that it is not our function to decide how far the activities of Penn Water and Consolidated are subject to the regulations of the Federal Power Commission or the Pennsylvania Public Utility Commission. "It may well be, although the present arrangement between the Maryland and Pennsylvania utilities is invalid for the reasons set forth, that an interconnection of facilities and an interchange of electrical energy between them may be continued by some method that would meet with the approval of the appropriate regulatory authority and

will not offend either the anti-trust laws or the utility laws of Pennsylvania."

Throughout the trial of this case and in the argument of the pending motion, Penn Water has reiterated its desire to continue to supply electric energy to Consolidated; and in view of the close relationship between the parties, the existence of interconnecting equipment and the control over its rates by the regulatory bodies, there is no reason to fear that the interests of consumers of electricity in Maryland will suffer through the invalidation of the existing contract between the two utilities.

The District Court should issue a declaratory judgment (1) setting aside its judgment and order of March 18, 1950; (2) declaring that the agreements of December 31, 1927, June 1, 1931 and September 29, 1939 are void and of no effect; and (3) dissolving the restraining order of February 9, 1949.

[fols. 5593-5612] Certificate of Service omitted in printing.

[fol. 5613] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

EXHIBIT "A"—TO MOTION FOR PERMISSION TO FILE A SUPPLEMENTAL BRIEF, ETC.—Filed July 6, 1951

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil 5253

PENNSYLVANIA WATER AND POWER CO.
et al

v.

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER CO. *et al*

MEMORANDUM BY THE COURT

Pattern for decision here is prescribed by Pennsylvania Water & Power Co. v. Consolidated Gas Electric Light and Power Co., 4 Cir. 184 F. 2d 552, from which it follows that

summary judgment must go for the plaintiffs on their motion. The instant or 3-party contract of June 1, 1931, designs a restraint violative of the Sherman Act, 15 USCA 1 *et seq.*, and in the process breaks the Pennsylvania laws by reducing Safe Harbor Water Power Corporation from a public utility to an impotent agency of the other parties. This conclusion is reached from an examination of the agreement in the light of the following indisputable and environing facts: that generation of electricity for wholesale is the business of each of the parties; that the geographical and relative location of their generating plants, of Penn's and [fol. 5614] Consolidated's transmission lines and inter-connections, and of the territory and patrons served by all of them, are as shown upon the map now in the record; and that the 2-party agreement, Safe Harbor's corporate papers, its certificate of convenience, the orders of the Pennsylvania Utility Commission thereon, and the pertinent statutes of that State, are as pleaded.

I. Two of the contracting parties, Penn and Consolidated, are conclusively found to be potential competitors in the Penn Water Case, *supra*. That the third party, Safe Harbor, is also a latent competitor is manifest from the location of its plant in reference to Penn Water's, from the easy deliverability of its power to the customers of Consolidated, notably in the Washington area, as well as to the patrons of Penn Water, albeit at present needing the transmission lines of the latter for such purposes. The opinion in the Penn Water Case recounts the routing of all their generated power, including Safe Harbor's, and thereby clearly proves its competition with the current of the others.

It might almost be said that the judgment in the Penn Water Case struck down the 3-party agreement as well as the 2-party contract, so closely are the agreements tied together by their terms. The nexus is declared amain by the recitals in the second and third paragraphs of the 2-party agreement, virtually avowing the 2-party to be the master agreement operating the 3-party contract. Article II expressly incorporates Safe Harbor power as an item of the 2-party agreement. The supplement, dated August 1, 1932, to the 3-party contract reaffirms the terms of the latter but in its section Fourth adopts some of the terms of the 2-party agreement. As will be evident upon their discussion, the play of the restrictive covenants in the 3-party agreement

reveals this contract as a furtherance of the 2-party plan, [fol. 5615] extending the 2-party circumscription to the source of the Safe Harbor energy. Nevertheless the Court will construe the 3-party agreement *de novo*.

Examining the agreement, we find its affront to the Act consists of the investiture of Penn and Consolidated with the absolute power to restrict the other, in the use and enjoyment by such other, of its rightful entitlement in Safe Harbor's production, as well as to restrict Safe Harbor in its freedom of contract and action generally. The principal restrictions are contained in Articles III and IV.

Under Article III(a) "additional machinery or equipment" shall be installed by Safe Harbor at the request of Consolidated or Penn at the expense and for the use of the requesting party, but only with the consent of the other. By the same Article no current from "additions" to the Safe Harbor Plant may be supplied to anyone other than Penn and Consolidated without the consent of both of them. As an over-all restraint, Article IV forbids Safe Harbor to "enter into other agreements with either receiving company without the approval of the other."

These stipulations are strangulations. They choke each of the recipients in its full exercise of its ownership in the power purchased of Safe Harbor; they choke Safe Harbor too. They do not merely limit one party from impinging the other's rights; their reach is more than defensive.

No mechanical appliances, if and when available, could be furnished by Safe Harbor for Penn Water, though at Penn Water's expense, say to multiply, preserve or improve Penn Water's share, without Consolidated's approval, or vice versa. By forbidding the sale of power from such additions to anyone else, plant additions by Safe Harbor are effectually banned unless approved by *both* of the other two—even an addition for the benefit, and at the cost, of only one of them.

[fol. 5616] As Safe Harbor may not contract *in any manner* as to the generation and supply of energy, with Penn or Consolidated without the assent of the other, neither Penn nor Consolidated could establish any other outlets, than those originally fixed at the plant to draw off its purchase of power, without the nod of the other. Consolidated having no direct connection with Safe Harbor could never obtain one if Penn objected. Article XII fixes the points of delivery from

the Safe Harbor plant and makes any change dependent on the approval of both Penn and Consolidated. The supplemental agreement of August 1, 1932, exemplifies the enforcement of Article XII.

Penn or Consolidated could not by its sole direction release any part of its contract share to allow any portion to be sold and diverted elsewhere by Safe Harbor, notwithstanding Article III(c) contemplates such sales.

Similarly Safe Harbor is barred from selling any power to others, assuming such power to become available through expansion of its plant, because under the contract it cannot sell, save to Penn and Consolidated, energy derived from additions.

Threat of injury to the public from a contract of this kind is obvious, without reference to legislation, such as the Sherman Act, outlawing restraints.

Of similar stipulations in the Penn Water Case the Court of Appeals declared their effect "forbids plant expansion or development," prevents the sale of electric energy by one corporation without the approval of the other, and thereby empowers the one to fix the prices of the other. 184 F. 2d 557, 558. No other authority is requisite to justify the conclusion that the instant stipulations *per se* violate the Sherman Act and are not saved by the "rule of reason." [fol. 5617] It is no answer to argue that in fact additions are not possible at Safe Harbor and the contract restriction thereof is consequently only of academic interest. When the contract was executed, and that is the time as of which its validity must be judged, expansion was admittedly practicable. Indeed, the supplemental agreement of November 22, 1939, authorized such an extension and at the same time evinced the parties' familiarity with the assailed restriction. It is dangerous to prophesy what science may do towards expansion. However, no factual issue is here presented—on the feasibility of additions—because the restriction is by its breadth and sweep condemning in and of itself. Then, too, the restraint includes "additional machinery or equipment" as well as "additions to its plant" and the possibility of its installation is surely not moot.

The enumerated consequences of Articles III(a) and IV are not hypercritical suppositions of remote possibilities; they are the immediate potentialities of those stipulations.

No less objectionable are the restrictions when the ar-

rangement devised by the contract is viewed as solely a plan for joint ownership and operation of the Safe Harbor plant by the Penn Water and Consolidated, that is, if Safe Harbor Corporation be treated as merely an instrument for holding and operating the plant for the other two. If this were legally possible, or if the joint ownership and operation had been accomplished without the intervention of another corporation, the restrictions of the contract would be just as obnoxious. They would still enable each corporation unwarrantably to control the use and enjoyment by the other of its share of the joint product.

That the plan was simply one of joint ownership and operation is refuted by the actualities. The parties saw fit to adopt the present means. They have brought into the [fol. 5618] scheme a live, separate, and independent public service corporation, the Safe Harbor Water Power Corporation. The latter is a real party to the contract, with definite obligations and liabilities. Consolidated and Penn Water may not now ignore its reality. Schenley Corp. *v.* U. S., 326 U. S. 432, 437. It is not a wholly owned subsidiary of either. Its individuality at once appears when we recall that its capital stock may at any time become the property of others than Penn Water and Consolidated, or that the stockholders might disagree, as apparently they have now. Safe Harbor's independence is starkly accentuated in the realization that it owes important duties to the public, for which it must account through the appropriate governing bodies of the State of Pennsylvania. But, even so, the status of Safe Harbor is not decisive of this case; it may be classed as a non-entity, a subsidiary of the other parties, or their creature, *n'importe*, and yet the agreement would still be vitiated by the mutually constricting covenants between Penn and Con.

II. Again, the agreement in suit as plainly transgresses the laws of the State of Pennsylvania as did the 2-party contract in the Penn Water Case, *supra*. Just as the agreement there disabled Penn Water from the performance of its public duties, so here the present contract, through the restraints effected by Articles III and IV in the manner already pointed out, has caused Safe Harbor to contravene the Pennsylvania statutes proscribing the surrender to another, without the approval of its Public Utility Commission, of any of its powers, franchises or privileges. Judge

Soper's discussion of this subject fully and featly disposes of it. Pp. 566-568.

The aim of the 3-party agreement is to place the internal control of Safe Harbor in the hands of Penn Water and Con- [fol. 5619] solidated. It does so not only by the restrictions of Articles III and IV but also through the Operating Committee established by Article XIV. This Article constitutes the Committee as both advisory and regulatory of Safe Harbor. The board of directors of Safe Harbor are deposed from their place of guidance and responsibility. In few, the contract destroys the corporate virility of Safe Harbor and subjugates it as a mandate of Penn Water and Consolidated, depriving Safe Harbor of the discretion and initiative necessary to respond and be alive to its public obligations. This is intolerable under the common law and statutes of the State of Pennsylvania.

In the briefs and oral argument the defendants, while insisting that the restrictions of the contract were not invalid, urged that they were severable from the contract, and if unlawful, they could be stricken without violence to the remainder of the agreement. Whether or not contract provisions are separable must be determined from the face of the agreement where the agreement is clear and complete. Study of the 3-party contract convinces the Court that the objectionable provisions cannot be severed from the whole; that the agreement is entire and indivisible, its covenants dependent; and that the restrictive terms are of the warp and weft of the agreement and, if taken out, the residual could not be said to represent the agreement of the parties. U. S. *v.* Bethlehem Steel Corp., 315 U. S. 289, 298.

The Court has no doubt of its jurisdiction of this case, and its right to consider the non-federal ground of the cause of action; that there is no genuine issue of fact in the foundation upon which the motion for summary judgment is made; and that it is an appropriate instance for the entry of a summary declaratory judgment.

Finally, the Court observes that in determining whether the contract violates the Sherman Act or the common [fols. 5620-5694] and statute law of Pennsylvania, it must be read objectively and impersonally, and must be measured against the public interest evidenced by the Sherman Act, the public utility laws of Pennsylvania, and the policy of the common law; if *in posse* it is offensive to either, the contract

must fall, irrespective of the pure intention or good faith of the parties.

After submission to opposing counsel for comment as to form, counsel for the plaintiffs will present a decree declaring invalid and inoperative the 3-party agreement of June 1, 1931 with its two supplements.

(Sgd.) ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
May 3rd, 1951.

[fol. 5695] UNITED STATES COURT OF APPEALS

No. 10236

PENNSYLVANIA WATER & POWER COMPANY, a Corporation, and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, a Corporation, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 10239

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 10531

PENNSYLVANIA WATER & POWER COMPANY, a Corporation, and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, a Corporation, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition for Review of Orders of the Federal Power Commission and on Motions to Set Aside Orders of the Federal Power Commission.

OPINION

Decided July 3, 1951

Mr. Randall J. LeBoeuf, Jr., with whom *Messrs. Craigh Leonard, Wilkie Bushby, Raymond Sparks, F. G. Awalt, Preston C. King, Jr.*, and *Daryal S. Myse* were on the brief,

for petitioners Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland.

Mr. Charles E. Thomas, Counsel, Pennsylvania Public Utility Commission, *pro hac vice*, by special leave of Court, [fol. 5696] with whom *Mr. Thomas M. Kerrigan*, Assistant Counsel, Pennsylvania Public Utility Commission, was on the brief, for petitioner Pennsylvania Public Utility Commission.

Messrs. Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission, and *Reuben Goldberg*, Attorney, Federal Power Commission, with whom *Mr. Bradford Ross*, General Counsel, Federal Power Commission, was on the brief, for respondent.

Mr. Charles D. Harris, General Counsel, Public Service Commission of Maryland, for intervenor Public Service Commission of Maryland.

Messrs. G. Kenneth Reiblich and *Alfred P. Ramsey* for intervenor Consolidated Gas Electric Light and Power Company of Baltimore.

Before WILBUR K. MILLER, BAZELON and FAHY, Circuit Judges.

BAZELON, *Circuit Judge:* In 1944, the Federal Power Commission received two petitions—one from the Mayor and City Council of Baltimore and others, the other from the Public Service Commission of Maryland—requesting that it institute an investigation of the justness and reasonableness of the rates and charges of Pennsylvania Water and Power Company and Susquehanna Transmission Company of Maryland[1] with regard to such of their sales or transmission of electric energy as are subject to the Federal Power Act. By orders issued in September and October of 1944, the Commission assumed jurisdiction and began its investigation of petitioners' rates and charges. Intervention was requested by the Pennsylvania Public Utilities Commission, the Maryland Commission, and Consolidated Gas Electric Light and Power Company of Baltimore,[2] all of whom were permitted to and did participate in the hearings before the Commission. Those hearings, which began on April 15, 1946, and continued until July 16, 1947, were

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[1] Hereinafter referred to as petitioners or Penn Water.

[2] Hereinafter referred to as Baltimore Company.

extensive in nature and produced a voluminous record. In January 1949, the Commission issued its order requiring Penn Water to reduce its rates and charges in accordance with the Commission's findings. The revised schedules submitted in an attempt to comply with the Commission's order were considered unsatisfactory and, on October 27, 1949, the Commission prescribed its own schedules for Penn Water's services. Petitioners seek review of both the January and the October orders, as does the Pennsylvania Public Service Commission which intervened before the Commission. In addition, the same parties have moved to set aside the orders or to obtain appropriate alternative relief.

The various proceedings before the Commission present a picture of petitioners' operations which is essential to an understanding of the issues now before us. Penn Water owns and operates both a hydroelectric and a steam generating plant at Holtwood, Pennsylvania, which is on the Susquehanna River, some nine miles north of the Pennsylvania-Maryland border. In addition, Penn Water and the Transmission Company together constitute an interconnected interstate transmission system—with Penn Water owning and operating that part of the system which is located in Pennsylvania and Transmission Company, its wholly-owned affiliate, operating the Maryland facilities. A [fol. 5697] third company, Safe Harbor Water Power Corporation,[3] owns and operates a hydroelectric development at Safe Harbor, Pennsylvania, the transmission facilities of which also interconnect with Penn Water and Transmission Company.

The interest of Baltimore Company in these proceedings stems from certain system foundation contracts which have, for the past twenty years, tied its operations to those of petitioners and of Safe Harbor. Under these contracts, Penn Water is required to provide Baltimore Company at all times with the capacity and energy available at its hydro and steam plants, beyond that part of it which is needed to fulfill its own commitments to customers. Those customers must, however, have been previously approved by Baltimore Company. Baltimore Company is also entitled, by contract,

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[3] Hereinafter referred to as Safe Harbor. This company is affiliated with Penn Water and Baltimore Company, each of which owns fifty per cent of its voting stock.

to receive two thirds of Safe Harbor's output and such part of the remaining one third which is left after Penn Water's needs are satisfied. In turn, Penn Water is entitled to receive from Baltimore Company steam energy to the extent that it is available after Baltimore Company's requirements have been met. Nor do the contractual entitlements of Baltimore Company necessarily represent power used by it. Its hydro entitlement is at the disposal of the entire system in order to permit the lowest incremental cost energy to be used as needed at the various parts thereof. In return for the rights granted it under its contract with Penn Water, Baltimore Company assures Penn Water of revenues sufficient to cover all of its operating expenses and a specified return on its investment. Similarly, both Penn Water and Baltimore Company assure Safe Harbor of a combined annual payment which yields a specified return above operating expenses. The function of these contracts and of the interconnection of facilities which they accomplish is, in the words of the Commission, to achieve operations which are "closely integrated and coordinated as a matter of economy, efficiency, flexibility, and maximum utilization of hydro capabilities * * *"[4] of a river which has a very variable flow.[5]

I

Before considering the various challenges to the Commission's rate order, we will address ourselves to petitioners' motions to set aside and annul that order. These were filed with us on December 29, 1950, shortly after the United States Court of Appeals for the Fourth Circuit had issued a judgment declaring certain phases of the contractual arrangements between Penn Water and Baltimore Company illegal under the federal antitrust laws and the laws of Pennsylvania.[6] The illegality of these system foundation contracts was first raised by petitioners in their petition for rehearing of the January 1949 order, about nineteen months before the

[4] Opinion No. 173 of the Federal Power Commission, Appendix to Petitioners' Brief, p. 43.

[5] See discussion, *infra*, pp. 11-12.

[6] *Pennsylvania W. & P. Co.* v. *Consolidated G., E. L. & P. Co.*, 184 F. 2d 552 (4th Cir., 1950), cert. denied 340 U. S. 906 (1950).

Fourth Circuit decision was handed down. The Commission denied the request for rehearing, ruling *inter alia,* that the [fol. 5698] validity of the Commission's order is not dependent upon the legality of the contracts under the antitrust laws. Petitioners' position here is that the Fourth Circuit's decision requires us to invalidate the Commission's rate order.

The problem raised by the motions is one of the interrelation of two statutory schemes—each of which reflects different historical pressures and different conceptions of the public interest. The Sherman Act and related laws represent an attempt to keep the channels of competition free so that prices and services are determined by the workings of a free market. They derive from the conviction that the greatest good to the greatest number will be attained by preventing monopoly, monopolizing and combinations in restraint of trade. In marked contrast is a statute such as Part II of the Federal Power Act.[7] It evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business. In place of competition as a generalized and indirect regulator of prices and services in the field of interstate transmission of electric energy at wholesale, Congress has substituted a regulatory agency authorized to supervise almost every phase of the regulated company's business.[8] Rates charged by such utilities, as well as the services and contractual provisions affecting them, must be "just and reasonable." And what is "just and reasonable"

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[7] 15 U.S.C. §§ 824 *et seq.*

[8] "In the relationship of government to most private businesses competition is relied upon to control prices in the interests of consumers, but such is not the case with private electric utilities. Competition implies two or more sellers offering their products or services to the same public, and two sellers of electricity in the same territory would mean duplication and wasteful investment. Regulation, therefore, in a general sense may be said to act as a substitute for competition." Twentieth Century Fund, *Electric Power and Government Policy* 45 (1948).

is not determined by the pressures of competition but by the adequacy of the service to the public, the fairness of the return allowed upon the investment in the company, and the degree to which the congressional objective of efficient use of the nation's power resources is served. Nor was Congress unmindful of the problems of undue concentration of power in this field, characterized as it is by local monopolies. In the Public Utility Holding Company Act, it provided antitrust-like remedies to assure that integration of power companies be limited in scope and confined to an efficient power area.[9]

These contrasting objectives indicate that the antitrust laws can have only limited application to industries regulated by specific statutes. Those laws, though quite properly viewed as having been intended "to make of ours * * * a competitive business economy,"[10] are not constitutional mandates which freeze all aspects of our economic system for all time into the pattern of "laissez-faire." We think it obvious that they may not be extended beyond that part of the economy which Congress intended to leave to the operation of the free market. "Certainly what Congress has forbidden [fol. 5699] by the Sherman Act it can modify. * * * [It] is not impotent to deal with what it may consider to be dire consequences of laissez-faire."[11]

Courts have given effect to considerations such as those outlined above by confining the operation of the antitrust laws to those matters which are not the product of state action or which fall outside the reach of power vested in a regulatory agency. Thus, Congress or the states may authorize arrangements among producers even though such action without governmental sanction and enforcement would violate the antitrust laws.[12] Similarly, states may au-

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[9] See Trienens, *The Utility Act as a Solution to Sherman Act Problems*, 44 Ill. L. Rev. 31 (1949); Comment, *Section 11(b) of the Holding Company Act*, 59 Yale L. J. 1088 (1950).

[10] *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 559 (1944).

[11] *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 396 (1940).

[12] *Parker* v. *Brown*, 317 U. S. 341, 350-352 (1943); *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 560 (1939); *United States* v. *Borden*, 308 U. S. 188, 201-202 (1939).

thorize monopolies[13] and Congress may substitute direct price fixing by a public agency for competition.[14] But when the practice complained of is not protected by legislative sanction, either directly or by being committed to a commission empowered to deal with it, the antitrust laws have been relied upon as a minimal means of protecting the public interest. The net effect of what we have already said is that, though regulated industries are not *per se* exempt from the antitrust laws and repeals by implication are not favored, the antitrust laws are superseded by more specific regulatory statutes *to the extent* of the repugnancy between them.[15] That is not to say that competitive considerations may not be components of the public interest sought to be served by a particular regulatory statute, and hence a guide to a commission's exercise of its authority when the question is properly before it. Thus, it has been said that the Federal Communications Act "recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted."[16] But where a statute provides for compre-

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[13] *Olsen* v. *Smith*, 195 U. S. 332, 344-345 (1904); *Lowenstein* v. *Evans*, 69 Fed. 908, 911 (Cir. Ct. S. Car., 1895).

[14] *Sunshine Coal Co.* v. *Adkins*, 310 U. S. at 395-396.

[15] *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485 (1932); *Terminal Warehouse* v. *Pennsylvania R. Co.*, 297 U. S. 500, 514 (1936); *United States* v. *Borden*, 308 U. S. at 198-201; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 455-457 (1945); *U. S. Alkali Ass'n* v. *United States*, 325 U. S. 196, 205-206 (1945).

[16] *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 474-475 (1940); *Mansfield Journal Co.* v. *Federal Communications Commission*, — U. S. App. D. C. —, 180 F. 2d 28 (1950). But cf. *Mackay Radio & Tel. Co.* v. *Federal Communications Commission*, 68 App. D. C. 336, 338, 97 F. 2d 641, 643 (1938); ("Though the Communications Act forbids the licensing of concerns which violate the anti-

hensive and detailed regulation of a particular industry, as do the Interstate Commerce Act and the Federal [fol. 5700] Power Act [17] there is, as we have indicated, only a limited area for application of antitrust considerations to Commission decisions.[18]

Applying those general propositions to the problem before us, we find that the Fourth Circuit's decision,[19] like that of the Supreme Court in *Georgia* v. *Pennsylvania R. Co.*,[20] seeks to assure public utility companies of freedom to exercise their private initiative in promulgating rates, services and changes therein. This limited freedom of action is an important condition precedent to proper operation of the rate-making process. Without it, the rates proposed and approved may tend to find themselves in the upper reaches of the zone of reasonableness within which rates may properly fall. The antitrust laws have been the means of assuring that such initiative remains unchecked by conspiracies or other illegal arrangements with which the regulatory commission is powerless to deal.[21] That is not to say, however, that if otherwise illegal arrangements are permitted or required by a valid statute, they are not shorn of their illegality to that extent.

We construe the Fourth Circuit's decision as having done no more than declare illegal under the antitrust laws cer-

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trust laws, it does not apply to the radiotelegraph business the policy of free competition, but a contrary policy. Free competition means that all are free to compete. The Communications Act forbids competition by all who cannot prove that their entry will serve the 'public interest, convenience or necessity'."); *Yankee Network* v. *Federal Communications Commission*, 71 App. D. C. 11, 22, 107 F. 2d 212, 223 (1939).

[17] "The plan or scheme of the Federal Power Act is analogous to that of the Interstate Commerce Act * * *." *Northwestern Pub. Serv. Co.* v. *Montana-Dakota Util. Co.*, 181 F. 2d 19, 22 (8th Cir., 1950), aff'd — U. S. —, 19 L. W. 4278 (1951).

[18] See *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 84-87 (1944).

[19] 184 F. 2d at 560.

[20] 324 U. S. at 459-462.

[21] *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. at 455, 460.

tain restraints exercised by Baltimore Company upon Penn Water—such as requiring its approval before it could take on new customers or expand generating facilities. Those restraints had been privately agreed upon by the parties and submitted to the Commission as an accomplished fact. The court was careful to avoid using language which might be interpreted in such fashion as to affect any rate proceeding then in process. This approach followed the lead of the Supreme Court in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. at 461-462. It was pointed out in the *Georgia* case that issuance of an injunction under the antitrust laws against the conspiracy there charged would in no way affect any rate proceedings. It would merely enable the parties to exercise their initiative with regard to future rate proceedings.

In our view, the Fourth Circuit's opinion neither purported to nor did relieve Penn Water from its obligation under the Federal Power Act to continue the then-existing services and rates. It is those services and rates, reflecting underlying operations, which were the subject of the Commission's order. "A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by" the regulatory statute.[22] The validity of Commission action in this proceeding must be determined in light of the criteria furnished by the Federal Power Act, as applied to the operations and arrangements under scrutiny. If jurisdiction was properly assumed by the Commission, if its rate order is "just and reasonable" within the meaning of the Federal Power Act,[23] and if its findings are [fol. 5701] supported by substantial evidence,[24] Penn Water can have no complaint and our review is at an end. If petitioners, as a result of the Fourth Circuit's decision, wish to make any changes in operations, contracts, arrangements, etc., within the jurisdiction of the Federal Power Commission, they must do so in accordance with the Federal Power

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[22] *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 162 (1922).

[23] Federal Power Act, § 205(a), 16 U.S.C. 824(a).

[24] Section 313(b), 16 U.S.C. § 825 l (b).

Act.[25] Under § 205(d) thereof, "Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public."[26] Pursuant to that section, petitioners may submit new arrangements and rates based thereon to the Commission. And the Commission "either upon complaint or upon its own initiative without complaint" may "enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service * * *."[27] If Penn Water feels itself aggrieved after such proposed changes have been acted upon by the Commission, it may at that time bring a new petition for review. In short, a "rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided" by the statute.[28]

To grant petitioners' motions and set aside the order at this time would be to substitute antitrust criteria for those of the Federal Power Act, a substitution which would be at cross-purposes with the intent of Congress. It would result in the reopening of a rate proceeding begun in 1944 because of an issue raised for the first time on rehearing in 1949 and a decision handed down in a suit between private parties under a non-controlling statute in 1951. In view of this chronology, we think the Supreme Court's statement in *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 514 (1944), is especially pertinent: "If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."[29] The effect of granting peti-

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[25] Cf. *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe L. Co.*, 173 F. 2d 784, 788-789 (6th Cir., 1949).

[26] 16 U.S.C. § 824d(d).

[27] Section 205(e), 16 U.S.C. § 824d(e).

[28] *Robinson* v. *Baltimore & Ohio R. R.*, 222 U. S. 506, 510 (1912).

[29] See *United States* v. *Pierce Auto Lines*, 327, U. S. 515, 535-536 (1946).

tioners' motions would be to disrupt a pattern of regulation which was carefully drawn to meet the problems of a complex industry.

Petitioners rely for their position not only on the effect of the antitrust laws upon a regulated industry but also upon the fact that Penn Water, as a licensee under Part I of the Federal Power Act,[30] is subject to § 10(h) which is [fol. 5702] said to incorporate Sherman Act standards into the Federal Power Act.[31] Section 10(h) does indeed virtually restate the Sherman Act. But it is found only in Part I of the Federal Power Act, which deals with water-power licensees, and not in Part II, dealing with public utilities selling electric energy in interstate commerce at wholesale. This fact alone would indicate that Congress did not intend to make licensees which are also Part II companies, such as Penn Water,[32] subject to § 10 (h).

But there is a more fundamental reason for holding § 10 (h) inapplicable to Part II companies. The very thing which that section prohibits, the combination of licensees with others to limit the output of electrical energy, is made one of the primary objectives of Part II. Section 202(a)[33] thereof imposes the duty upon the Commission to encourage public utilities to combine for the interconnection of facilities. Under certain circumstances, the Commission may even order such interconnections and regulate the rates and contractual arrangements involved therein.[34] The end thus sought to be achieved and, in the Commission's view,

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[30] Penn Water was ordered to apply for a license under Part I in 1939. See *Pennsylvania Water & P. Co.* v. *Federal Power Commission*, 74 App. D. C. 351, 123 F. 2d 155 (1941). According to the Commission's opinion here, no license has yet been issued. See Opinion No. 173, Federal Power Commission, Appendix to Petitioners' Brief P. 58, n. 21.

[31] That section, 16 U.S.C. § 803(h), provides: "Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

[32] See Discussion, *infra*, pp. 8-11.

[33] 16 U.S.C. § 824a(a).

[34] *Id.* § 824a(b).

served by the present arrangement between Penn Water and Consolidated, is the most efficient use of the nation's resources consistent with the public interest in cheap power and in conservation. We are unable to accept the proposition that Congress intended to have § 10(h) prevent that which is contemplated by Part II, a statute which is later in time and more specific in application. Our view is supported by the fact that § 10(h) is found in that part of the Act which establishes a limited federal regulatory scheme—one which does not come into play unless (1) the state in which the licensee is located has no regulatory commission, or (2) the state commissions involved are unable to agree upon rates for interstate sales.[35] It seems entirely likely that Congress believed that, in the absence of detailed federal regulation such as that in Part II, licensees should be required to adhere to antitrust standards. This is, in effect, saying no more than what we have already said about the antitrust laws and regulated industries. The prohibitions of § 10(h) would apply to a licensee which is also regulated under Part II only to the extent that the prior statute is not repealed by the clear repugnancy between it and the later statute.

The motions to set aside or remand the Commission's orders on the basis of the Fourth Circuit's decision and the other points referred to above are denied.

II

The Federal Power Commission assumed jurisdiction of petitioners' rates and services pursuant to both Parts I and II of the Act. Petitioners challenge this assumption of jurisdiction on the ground that licensees may be regulated only under Part I and that the Commission's finding that [fol. 5703] the states involved are unable to agree, which is a condition precedent to federal jurisdiction under Part I, is not supported by the evidence.

Part I applies to all federal water-power licensees, whether operating in intra- or interstate commerce. It makes Federal Power Commission regulation of the interstate operations dependent upon either (1) the non-existence of a state regulatory commission in the licensee's state,

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[35] Federal Power Act, §§ 19, 20, 16 U.S.C. §§ 812, 813.

or (2) the inability of the states involved in the licensee's interstate activities to agree.[36] Part II is not so qualified. It confers broad authority upon the Commission to regulate the rates, services, etc., of all public utilities which own and operate facilities engaged in the "transmission of electric energy in interstate commerce" and in "the sale of electric energy at *wholesale* in interstate commerce."[37]

If the Commission is correct in its view that petitioners' present operations are interstate in nature and involve the transmission and sale of electric energy at wholesale, a question we will discuss *infra*,[38] then they are drawn within the express language of Part II unless the existence of Part I requires that we read an implied exception for licensees into Part II. Such a construction might appear more plausible if § 201(f)[39] of Part II did not specify those to whom that Part was not intended to apply. That section conspicuously makes no reference to Part I licensees. It seems unlikely that Congress would not have included so important a group as federal water-power licensees among the specific exceptions to Part II if it had actually intended to except them.

The only judicial utterances cited to us in this regard are to the effect that "'Part II, as added in 1935, gives the Commission jurisdiction over the transmission and sale of electricity at wholesale in interstate commerce, whether or not by licensees'"[40] and that the Safe Harbor Company "is not only a *licensee* under Part I but it is also a *public utility* under Part II."[41] Neither *Alabama Power Co.* v. *Federal Power Commission*[42] nor *Niagara Falls Power Co.* v. *Federal Power Commission*,[43] both of which contain language which might be thought to run counter to Part II jurisdic-

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[36] Section 20, 16 U.S.C. § 813.

[37] Section 201(b), 16 U.S.C. § 824(b). (Emphasis supplied.)

[38] See pp. 11-13.

[39] 16 U.S.C. § 824(f).

[40] *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d 800, 804 n. 4 (3d Cir., 1941).

[41] *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 179 F. 2d 179, 185 (3d Cir., 1949), cert. denied 339 U. S. 957 (1950).

[42] 75 U. S. App. D. C. 315, 328, 128 F. 2d 280, 293 (1942).

[43] 137 F. 2d 787, 792-793 (2d Cir., 1943).

tion over a licensee, was a rate case. Neither involved Part II and the possibility of conflict between Parts I and II was not discussed.

Legislative history bearing directly on the point also supports application of Part II to licensees. For example, Representative Rayburn, Chairman of the House Committee reporting the bill, pointed out that there was no need to make certain prohibitions contained in § 305(a), 16 U. S. C. § 825d(a), specifically applicable to licensees because they had already been made applicable to "public utilities" generally. He said, "The Senate bill includes licensees within the provisions of this section, but inasmuch as such [fol. 5704] licensees when interstate operating public-utility companies will be subject to the provisions of the section in any event, licensees have been omitted from the bill as reported, because of the lack of public interest in those companies which are not public utilities."[44]

We consider Part II to have occupied the field with regard to interstate wholesale rates of electric companies. It filled a gap in state regulation of electric companies which had been created by the Supreme Court's decision in the *Attleboro* case.[45] That case made it clear that interstate wholesale rates, as distinguished from interstate retail rates,[46] were beyond the reach of state regulatory Commissions.[47] The new legislation required to bring such rates under federal control, Part II, was drawn in 1935 with an eye to the peculiar problems of wholesale electric companies and in light of the considerable experience with such companies which had been gleaned in the fifteen years since the Federal Water Power Act had been drafted in 1920. It was

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[44] H. R. Rep. No. 1318, 74th Cong., 1st Sess., p. 31 (June 24, 1935).

[45] *Public Utilities Commission* v. *Attleboro Co.*, 273 U. S. 83 (1927). See *Jersey Central Co.* v. *Federal Power Commission*, 319 U. S. 61, 67-68 (1943); *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 964 (2d Cir., 1942).

[46] *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23 (1920).

[47] See discussions in *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 504-505 (1942); *Panhandle Pipe Line Co.* v. *Federal Power Commission*, 332 U. S. 507, 514-515 (1947).

apparent to Congress that application of this later scheme of regulation to the interstate wholesale rates of non-licensees alone would have created disparate regulatory treatment of licensees and non-licensees engaged in similar activities. Since this would have conflicted with the objective of Part I, which places primary emphasis upon state regulation in order to make treatment of licensees as much like that of ordinary state public service companies as possible, Congress conferred authority upon the Federal Power Commission to occupy the entire field of regulation of interstate wholesale rates, whether those of licensees or non-licensees. All other rates of licensees, whether engaged solely in intrastate activities or in interstate retail selling, were left to the regulatory scheme provided in Part I. Thus, even if Part I was intended to confer jurisdiction upon the states or the Federal Power Commission to regulate interstate wholesale rates, it was to that extent repealed by Part II.

The only problem suggested to us which may arise from such a construction is that, in the event of recapture by the United States of the site awarded to a licensee, which is also a public utility, payment would have to be made pursuant to a valuation formula contained in Part I, which is said to differ from that used for rate-making in Part II. We hardly think that the intention of Congress to reach all public utilities, whether licensees or non-licensees, under Part II can be ignored in order to eliminate the possibility that there may some day be an occasion for valuation of the property in a manner different from that provided for in Part II. The applicability of Part II to licensees would create no greater effect than would the usual pre-Part II situation, under which a state commission would ordinarily have been regulating the licensee's activities under its own regulatory statute prior to recapture.[48] We note, how-
[fol.5705] ever, that the Third Circuit has pointed out the essential sameness of the valuation formulas of Parts I and II.[49]

In view of our position with regard to the applicability of Part II, it is unnecessary for us to examine the sufficiency of the evidence in the record to support the Commis-

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[48] See *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F. 2d at 187.

[49] *Id.* at 188.

sion's finding under Part I that the Maryland and Pennsylvania commissions are unable to agree. But in the event that the Part I question should arise on appeal from our decision, we note that we have examined the record and find substantial evidence to support the Commission's finding on this point.

III

Rejection of petitioners' view that Part I furnishes the sole authority for federal regulation of their operations brings us to the contention that all or almost all their sales are intrastate in nature and hence may not be regulated under Part II. It is said that (1) Penn Water's sales to its Pennsylvania customers for resale are sales of electric energy produced and sold in Pennsylvania; (2) the back-feed energy generated by Baltimore Company to Penn Water and sold by it to its Pennsylvania customers loses its interstate character when it is received by Penn Water and commingled with the Pennsylvania-produced energy. Even if these sales of back-feed are considered interstate, it is suggested that they constitute so negligible a portion of Penn Water's total sales to Pennsylvania customers that they cannot furnish the basis of federal regulation, or that federal regulation may extend only to an allocable portion of interstate sales.

Section 201(b) of the Federal Power Act[50] makes Part II applicable.

> * * * to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydro-electric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in sections 824-825r of this title, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or

[50] 16 U.S.C. § 824(b).

over facilities for the transmission of electric energy consumed wholly by the transmitter.

We are convinced from an examination of the voluminous materials submitted to us that the Commission properly found Penn Water to be part of an "integrated and coordinated interstate electric system."[51] Energy generated at Safe Harbor and Holtwood flows south to Baltimore and, at times, Baltimore-generated energy moves north along the same line to Safe Harbor and Holtwood where it, together with energy generated there, is delivered to Penn Water's Pennsylvania customers. This movement to and fro is made necessary by the varying electric loads which [fol. 5706] must be supplied at various times of the day. The flow of the Susquehanna River, which is the source of Penn Water's hydro power, is too irregular to carry unaided the large utility loads it is often called upon to handle. Thus, during the river's low periods, hydro power is scarce and Baltimore Company's steam generators are used to "firm up" or keep constant the output of the hydro plants. At such times, the hydroelectric generators are operated only at the peak of the load and, during off-peak hours, the river flow is impounded in plant reservoirs for subsequent use at peak periods. Conversely, during the periods when the river is high, Penn Water's hydroelectric plants are used to supply the heavy loads in both Pennsylvania and Maryland which would otherwise have to be supplied by the more expensive steam generation.

As a result of the carefully coordinated operations of the participants in this interstate energy pool, Penn Water reaps the benefit of Baltimore's considerable and constantly available steam capacity while Baltimore Company enjoys the benefits of the cheaper hydro-electric energy. The activities of each are so meshed that the peak demands of the customers of each can be met easily at all times and with the most economic source of power then available. As the Commission has pointed out, the arrangements now in existence have been "carefully worked out" to meet the needs of the interstate system "as to firm energy requirements, while operations involving firm, interchange and emergency en-

[51] Opinion No. 173, Federal Power Commission, Appendix to Petitioners' Brief, p. 51.

ergy are conducted at all times by a dispatching system controlled by a dispatcher's office in coordination with various operating committees. * * * the constituent companies of this interconnected system plan and coordinate far in advance steam maintenance schedules which are based largely upon the predicted flows of the Susquehanna River and the determination of the availability of hydro energy during periodic steam maintenance outages."[52] Because such an energy pool, drawing upon the extensive steam and hydro capacities of Penn Water, Safe Harbor and Baltimore Company now exists, both Penn Water and Baltimore Company have been able to satisfy commitments which would otherwise be outside their individual capacities, as they are now constituted. Given such interconnected and integrated interstate wholesale operations, there can be no such thing as assigning a particular sale solely to operations within Pennsylvania. Each sale is in effect a pool sale drawn from the integrated interstate system and hence interstate in nature.

The same conclusion was reached by the Third Circuit with regard to another of the participants in this pool, Safe Harbor. The court pointed out that Safe Harbor is "part of a large integrated interstate electric system" and that its electric output "must be treated as an integrated whole."[53] In the second *Safe Harbor* case, the court again held that Safe Harbor's sales "constitute in fact wholesale sales in interstate commerce" because they are delivered to an integrated interstate electric system."[54]

[fol. 5707] We find substantial evidence in the record to support the Commission's factual findings with regard to the interstate nature of Penn Water's sales. It is the nature of the operations underlying the sales which furnishes the basis for Commission action rather than legalistic niceties of

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[52] *Id.* at p. 43.

[53] *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d at 802, 807.

[54] 179 F. 2d at 185 n. 9. See also *Jersey Central Co.* v. *Federal Power Commission*, 319 U. S. 61 (1943); *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 956-958 (2d Cir., 1942).

title and place of sale.[55] Those operations bring petitioners' rates and services within the reach of Part II of the Federal Power Act. The Commission did not assume jurisdiction over any direct consumer sales. It "was meticulous to take in only territory which this Court had held the States could not reach"[56]—interstate sales at wholesale.

IV

Penn Water challenges the Commission's determination of rate of return and its calculations of the rate base on both legal and evidentiary grounds. Ever since *Hope Natural Gas*[57] was decided, such challenges have become increasingly difficult to sustain. That case established the proposition that the Federal Power Commission is "'not bound to the use of any single formula or combination of formulae in determining rates,' so long as the 'total effect,' 'impact' or 'end result' of the rate order 'cannot be said to be unjust or unreasonable.' The limits set by the Court are deliberately broad, resulting both from notions of special competence and the conception of rate-making as a primarily legislative process. So long as the public interest—i.e., that of investors and consumers—is safeguarded, it seems that the Commission may formulate its own standards."[58] The "Commission may adopt any method of valuation for rate base purposes so long as the end result of the rate order 'cannot be said to be unjust and unreasonable'."[59] If a rate order produces "adequate revenues above operating expenses (including depreciation), to pay interest on the bonds, dividends on the stock and, in general, maintain the

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[55] *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 503-504 (1942); *Jersey Central Co.* v. *Federal Power Commission*, 319 U. S. 61, 69 *et seq.* (1943).

[56] Cf. *Panhandle Pipe Line Co.* v. *Federal Power Commission*, 332 U. S. 507, 519 (1947).

[57] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944).

[58] *Washington Gas Light Co.* v. *Baker*, —— U. S. App. D. C. ——, 188 F. 2d 11, 14-15, cert. denied 340 U. S. 952 (1951).

[59] *Id.* at p. 18.

financial integrity of the enterprise,"[60] it will not be disturbed. It still remains for us, however, to examine the theory upon which the Commission purported to act and to assure that its action was within the realm of allowable discretion and supported by substantial evidence.

a. Rate of return

Turning first to that part of Penn Water's petition which is addressed to rate of return, we find it argued that the 5¼ per cent allowed by the Commission on that part of the bonds and stock representing actual investment does not satisfy the test established in *Hope* and referred to above. Determination of the fairness of a rate of return requires "a study of the capital costs of the business, such as service on the debt and dividends on the stock, in the light [fol. 5708] of returns on investments in other enterprises having a similar risk factor. Only upon such evidence can the Commission determine what is required 'to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital'."[61] This "standards of finance resting on stubborn facts"[62] was satisfied by 324 U. S. 581, 605 (1945).
the Commission which carefully investigated Penn Water's position in relation to that of other utilities and concluded that it was less subject to risk than are most other utility companies. The assurance it receives from Baltimore Company, under presently existing arrangements, of revenues sufficient to cover operating expenses and a fair return on its investment removes much of even the small amount of risk ordinarily found in public utility companies. To refer, as Penn Water does, to the extraordinary risk involved in the abatement of Baltimore Company's payments to it if it fails to deliver energy because of acts of God is to illustrate how carefully insulated Penn Water really is from any substantial risk. Nor is the variability of the flow of the Susquehanna a substantial risk factor at present since Baltimore Company's payments to Penn Water are not dependent upon the latter company's output.

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[60] *Id.* at p. 15.
[61] *Id.* at p. 16.
[62] *Colorado Interstate Co.* v. *Federal Power Commission*,

It does not prove Penn Water's case to point to the higher than 5¼ per cent return earned by the average utility. Safe Harbor, for example, was allowed only a five per cent return by the Commission. On review, the Third Circuit said, "* * * It would be difficult to conceive of a more secure hydroelectric project"[63] and affirmed the rate order. In view of the similarity of their market and financial arrangements, it would seem that Penn Water's risks approximate Safe Harbor's more than they do those of the "average" utility. "Each utility presents an individual problem."[64] Stability of market and income, proximity of the company to the capital markets, a long history of satifactory earnings—all these are factors which go into the complex of fair return. Under the circumstances of this company, the Commission thought a 5¼ per cent return applied to the rate base and designed to provide 3.17 per cent for bonds, 5.21 per cent for preferred stock and 8.64 per cent for common stock and surplus was "fair." We think the Commission had substantial evidence before it to support its findings of fact on this phase of the case and that the rates allowed meet the test laid down in the *Hope* case. Nor do we think that a rate of return based upon the historical cost of capital or petitioners' milder approximation thereof, the competitive cost of capital, is a necessary part of that test. We think it sufficient to point out that cost of capital studies such as the one presented to the Commission have withstood judicial review in too many cases for us to reject the one now before us as a proper criterion of rate of return.

b. Rate base.

Petitioners contend that the Commission improperly excluded more than two million dollars from the amount found fol. 5709] by it to be the gross investment in property used and useful in the public service. Commission deduction of the reserve for depreciation from the gross investment in arriving at the net investment rate base is also challenged. The propriety of such a deduction under a regulatory formula like that in Part II is too well settled to warrant our discussing it at this time. Nor would Part I, if applicable,

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[63] 179 F. 2d at 199.

[64] *Driscoll* v. *Edison Co.*, 307 U. S. 104, 119-120 (1939).

require a different conclusion.[65] As to the items excluded from the rate base, we think the Commission acted properly and upon substantial evidence. We will discuss only the more important of them:

1. *Flashboard development costs*—The Commission included in the rate base the cost incurred in 1911 and 1912 in connection with the original installation of the project flashboard system but excluded almost $50,000 expended from 1913 to 1921. Such expenditures were for renewal of flashboards or for experimentation and testing in regard to improvement of flashboards, which experiments were ultimately abandoned. The record discloses that flashboards must be replaced so often, as a result of being carried away in whole or in part by high water, that expenditures in connection therewith are properly treated as operating expense and hence not includible in the rate base. Nor need the Commission include in the rate base abandoned experiments which do not manifest themselves in property useful in the public service.[66] There is ample evidence in the record to demonstrate that these experiments neither were necessary to nor contributed to the flashboard improvement ultimately adopted.

2. *Interest during construction*—The Commission allowed 6 per cent interest on construction costs during the period of construction to be included in the rate base on the theory that "during the period of construction 'there is no operating income available with which to meet these necessary charges incident to construction'."[67] But Penn Water disputes the finding that there was a cessation of construction for 22 months during the more than six year period of construction and the attendant exclusion from the rate base of interest for that period, amounting to over $700,000. Penn Water also objects to exclusion of other losses found by the Commission to be traceable to the cessation of construc-

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[65] *Safe Harbor Water & Power Corp.* v. *Federal Power Commission*, 179 F. 2d at 194.

[66] *Pennsylvania Power & Light Co.* v. *Federal Power Commission*, 139 F. 2d 445, 452 (3d Cir., 1944).

[67] *Puget Sound Power & Light Co.* v. *Federal Power Commission*, 78 U. S. App. D. C. 143, 144, 137 F. 2d 701, 702 (1943).

tion. "To justify allowance of interest during construction as part of the cost of the project it must appear that the licensee carried out his obligation * * * to prosecute the construction with due diligence'."[68] Here, the cessation of construction was due to the inability of Penn Water to obtain funds after it found that its financing was inadequate. Even if it be conceded that the financial market at the time of cessation of construction was as unsettled as Penn Water says, it does not follow that rate payers should now bear the burden of its failure to provide adequate financing in advance of construction to sustain the entire project. Such losses are as much due to a risk of the business as were the losses excluded from the rate base in the *Puget Sound* case. [fol. 5710] We agree with the Commission's view, expressed in its brief, that "Interest on the idle investment and other losses due to financial inability to go into operation as soon as the physical conditions of normal construction would permit are no more to be recouped from rate payers in later years than past losses in operation * * *."[69]

3. *Claimed costs from issuance of common stock for properties*—Twenty thousand shares of common stock in Penn Water's predecessor, McCall Ferry Power Company, were issued as part payment for certain properties. These shares are said to represent $500,000 in plant cost which should be included in the rate base. There was substantial evidence to support the Commission's conclusion that almost all the shares were acquired by one Hutchinson in a transaction which was not at arm's length and represented a profit beyond the cost of the properties to him. Hutchinson was part of a group which pooled properties and banking services necessary for the project and issued stock to itself beyond what the Commission found to be proper compensation for properties and services. Under such circumstances, especially since "neither party had any interest to reduce the nominal capitalization,"[70] the stock represented paper capitalization of anticipated profits rather than actual corporate assets. Commission exclusion of the 20,000 shares

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[68] *Ibid.*

[69] Respondent's Brief, pp. 71-72.

[70] *Niagara Falls Power Co. v. Federal Power Commission*, 137 F. 2d 787, 793 (2d Cir., 1943).

resulting from this transaction was merely an elimination of the water in the stock as measured by the estimated original cost of the plant.

4. *Expenditures previously charged to operating expense or to depreciation reserve*—These expenditures total almost $100,000. They were properly excluded from the rate base because they have already been recovered by investors in the form of annual charges to operating expenses and depreciation reserve.[71]

V

The Commission found that Baltimore Company was entitled to $1,733,318 of the total rate reduction of $1,954,261 ordered by it, based on 1946 operations. This allocation is challenged by petitioners who argue, *inter alia*, that it is based upon (1) an incorrect reading of certain governing contract provisions; (2) an incorrect measure of the cost of steam generated energy and capacity supplied by Baltimore Company and Penn Water; (3) an improper overstatement of revenues due to Baltimore Company from Penn Water. In view of what we have already said about the effect of the Fourth Circuit decision upon this rate proceeding, *supra*, pp. 3-8, there is no need to consider whether the various contracts involved herein are part of an arrangement declared illegal under the antitrust laws.

(1) Penn Water's generating capacity alone is inadequate to meet its commitments to its Pennsylvania customers. It makes up the deficiency in part through use of its contractual entitlement to one third of Safe Harbor's output and, to the extent of a deficiency thereafter, by diversion of part of Baltimore's two-thirds entitlement to Safe Harbor's output. The Commission included this diversion from [fol. 5711] Baltimore Company's entitlement as energy supplied by Baltimore to Penn Water for which Baltimore was entitled to a credit against Penn Water's cost of services to it. Penn Water argues, however, that the 2:1 entitlement to Safe Harbor's output does not arise until *after* Safe Harbor has met obligations, which it shares *jointly* with Penn Water, to certain of Penn Water's Pennsylvania customers.

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[71] See *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 591 (1942); *Washington Gas Light Co.* v. *Baker*, 188 F. 2d at 20.

Such a reading of the contract would mean that the energy said to be diverted from Baltimore Company by Penn Water to satisfy those customers was not Baltimore's at all and hence that no credit would be due to it. Penn Water's view proceeds from its assumption that since Safe Harbor is a party to the contracts referred to, it is obligated thereunder and that such contracts are obligations "to serve imposed on [it] * * * by law" which are specifically exempted from the 2:1 entitlement arrangement.

We think the evidence before the Commission amply disclosed that Safe Harbor was merely a nominal party to the contracts with the Pennsylvania companies and that it was made such as part of a short-lived attempt to obtain certain tax advantages. That attempt was never brought to fruition. If it had been, it would have resulted in a change of the three-way contract to provide that Baltimore and Penn Water "would purchase the *balance* of the Safe Harbor output in the proportion of two-thirds and one-third respectively." This contemplated change, which was never made, would have accomplished what Penn Water would like us to do even without the change. The three-way contract has consistently been interpreted by Safe Harbor and Penn Water in reports to stockholders and to various regulatory agencies as making a 2:1 division of Safe Harbor's entire output between Baltimore Company and Penn Water. And the same construction of the contract was referred to in the second *Safe Harbor* case when the court said, "Safe Harbor's output is delivered to an integrated interstate electric system under the terms of the so-called '1931 contract,' two-thirds of the energy being sold to the Maryland Company [Baltimore Company] and the remaining one-third going to the Pennsylvania Company [Penn Water]."[72]

The materials before the Commission were hardly consistent with the interpretation now sought by Penn Water. They pointed instead to the view, adopted by the Commission, that Baltimore Company had a two-thirds entitlement from Safe Harbor which was diverted by Penn Water in order to satisfy its Pennsylvania commitments.

(2) Penn Water contends that, even if Baltimore Company's energy was diverted by it for use in fulfilling its

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[72] 179 F. 2d at 184-185 n. 9.

Pennsylvania commitments, the Commission erred in the basis used by it for computing the resultant credit owing from Penn Water to Baltimore. Pointing to Article VII of Safe Harbor's Rate Schedule, Penn Water says that the credit should be based upon Safe Harbor's hydro costs rather than Baltimore Company's steam generated costs. We agree with the Commission's view that Article VII does not apply to voluntary diversions of energy such as are involved here. It applies only to failure of Penn Water, through impairment of its transmission facilities, to transmit Safe Harbor energy to Baltimore Company. There was no such impairment here but instead, there was a diversion at Penn Water's request and with Baltimore's consent, of [fol. 5712] part of the latter company's entitlement. If Penn Water's view were to prevail and it were to pay Baltimore only the hydro costs, Baltimore Company would have no incentive to permit diversion of its hydro entitlement. Such diversion requires it to use its more expensive steam generating facilities, a use for which it is compensated by Penn Water's payment of the cost of such steam generation to the extent it replaces Baltimore's hydro entitlement. This arrangement benefits Penn Water because it is enabled to satisfy commitments it could not otherwise undertake by paying the cost of the least expensive steam energy available at the time of need. Similarly, it is beneficial to Baltimore Company because it brings the less expensive hydro power into its system. The conclusions of the Commission on this point are proper and are supported by substantial evidence.

(3) The Commission included as part of Penn Water's cost of service to Baltimore Company the cost of energy sold by Penn Water as economy interchange—energy generated at a lower cost plant and used to replace generation at a higher cost plant—to certain of its Pennsylvania customers. And as part of what Penn Water owed to Baltimore Company, the excess revenues derived from such sales "for Baltimore's account" were included. The evidence supports the Commission's view that Baltimore Company is entitled to all of Penn Water's output and of Penn Water's one-third Safe Harbor entitlement remaining after Penn Water's firm power obligations to its Pennsylvania customers are met. The sales of interchange energy were sales of energy diverted from Baltimore Company's entitlement

and, as such, Baltimore was entitled to the revenues therefrom less, as we have indicated, payment to Penn Water for its cost of service.

VI

Penn Water raises many other points which, in its view, constitute error requiring us to reverse in part or to remand. Many of these points involve just the sort of weighing of evidence and making of pragmatic adjustments which fall within the special competence of an expert agency and which should not be interfered with by a court unfamiliar with day-to-day operations and complex technological and financial materials. Our review is designed to leave to the Commission the flexibility which is necessary if it is satisfactorily to discharge its function of protecting the public interest, and yet to prevent arbitrary action outside the scope of the Commission's authority. We have examined all the points raised and are convinced that the Commission's treatment of each one was within the range of its statutory authority and was supported by substantial evidence.

The motions to set aside or to remand the Commission's orders are denied and those orders are

Affirmed.

WILBUR K. MILLER, *Circuit Judge*, dissents and will file an opinion setting forth his views at a later date.

[fol. 5713] (File endorsement omitted)

UNITED STATES COURT OF APPEALS, APRIL TERM, 1951

PENNSYLVANIA WATER & POWER COMPANY, a Corporation and Susquehanna Transmission Company of Maryland, a Corporation, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

No. 10,236

[File endorsement omitted]

No. 10,239

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Respondent*

v.

FEDERAL POWER COMMISSION, *Respondent*,

No. 10,531

PENNSYLVANIA WATER & POWER COMPANY, a Corporation, and Susquehanna Transmission Company of Maryland, a Corporation, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petitions for Review of Orders of the Federal Power Commission and on Motions to Set Aside Orders of the Federal Power Commission.

Before: Wilbur K. Miller, Bazelon and Fahy, Circuit Judges.

JUDGMENT AND DECREE—Filed July 3, 1951

The above-entitled cases came on to be heard on the transcript of the record from the Federal Power Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED [fols. 5714-5720] by this court that the motions of petitioners filed herein December 29, 1950, to set aside the orders of the Commission on review herein or to remand these pro-

ceedings to the Commission be, and the same are hereby, denied.

IT IS FURTHER ORDERED by this Court that the orders of the Federal Power Commission on review herein be, and the same are hereby, affirmed.

Per Circuit Judge Bazelon.

Dated: July 3, 1951.

Circuit Judge Wilbur K. Miller dissents and will file an [fols. 5721-5739] opinion setting forth his views at a later date.

UNITED STATES COURT OF APPEALS

[Title omitted]

Before Wilbur K. Miller, Bazelon and Fahy, Circuit Judges

ORDER—Filed July 6, 1951

On consideration of the motion of the petitioners, Pennsylvania Water and Power Company and Susquehanna Transmission Company of Maryland, for leave to file a memorandum decision of the United States District Court for the District of Maryland, for leave to file a supplemental brief, and for oral hearing on the contentions urged in said supplemental brief, of the response of the respondent, of the answer of the intervenors, and of the replies thereto, it is

ORDERED by the Court as follows:

(1) That the motion for leave to file a memorandum decision be granted, and that the Clerk be, and he is hereby, directed to file forthwith the memorandum decision heretofore lodged with him;

(2) That the motion for leave to file a supplemental brief be, and it is hereby, denied;

(3) That the motion for oral hearing be, and it is hereby, denied.

Per Curiam.

Dated: July 6, 1951.

[fol. 5740] (File endorsement omitted)

IN UNITED STATES COURT OF APPEALS

EXHIBIT "A"—TO PETITION FOR REHEARING—Filed July 18, 1951

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

PENNSYLVANIA WATER & POWER COMPANY, *Plaintiff*,
PENNSYLVANIA PUBLIC UTILITY COMMISSION, INTERVENER,

v.

CONSOLIDATED GAS, ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE, *Defendant*,

PUBLIC SERVICE COMMISSION OF MARYLAND, *Intervener*

Civil Action

No. 4179

JUDGMENT AND ORDER ON MANDATE

Appeals having heretofore been taken to the United States Court of Appeals for the Fourth Circuit by the plaintiff, Pennsylvania Water & Power Company, and the intervener, Pennsylvania Public Utility Commission, from the judgment and order made in the United States District Court for the District of Maryland on the 18th day of March, 1950, dismissing the amended and supplemental complaint in this action; and said appeals having been duly heard by said Court of Appeals and that Court having on September 30, 1950 made and entered its judgment reversing said judgment and order appealed from with costs in favor of the plaintiff, Pennsylvania Water & Power Company, and of intervener, Pennsylvania Public Utility Commission, and [fol. 5741] with instructions to this Court to enter a declaratory judgment in accordance with the opinion and judgment of said Court of Appeals; and an order having been entered by the United States Court of Appeals, upon motion of the defendant, on October 26, 1950, staying the mandate and execution and enforcement of said judgment pending application by defendant to the Supreme Court of the United

States for a writ of certiorari within thirty days thereof, and such petition having been filed, and a petition for certiorari also having been filed by the Public Service Commission of Maryland, and said petitions for certiorari having been denied by the Supreme Court on December 11, 1950; and said Court of Appeals having duly issued its mandate on the 14th day of December, 1950, commanding that such proceedings be had in this cause, in conformity with the opinion and judgment of said Court of Appeals, as according to right and justice, and the laws of the United States, ought to be had, and said mandate having been duly filed in the office of the Clerk of this Court on the 15th day of December, 1950; and said Court of Appeals having filed an opinion on January 10, 1951, interpreting its said mandate;

Now, upon said appeal and all the papers and proceedings with respect thereto, and upon said mandate, it is

ORDERED AND ADJUDGED in favor of the plaintiff, Pennsylvania Water & Power Company, and the intervener, Pennsylvania Public Utility Commission, and against the defendant, Consolidated Gas Electric Light and Power Company of Baltimore, and the intervener, Public Service Commission of Maryland, this 17th day of January, 1951, that:

1. Said judgment and order of March 18, 1950, be, and the same hereby is, reversed and set aside, with costs, to be taxed by the Clerk;

[fol. 5742] 2. The following agreements between the plaintiff, Pennsylvania Water & Power Company, and the defendant, Consolidated Gas, Electric Light and Power Company of Baltimore:

Agreement as of December 31, 1927,
Supplemental Agreement as of June 1, 1931, and
Supplemental Agreement as of September 29, 1939,

are declared to be void and of no effect.

3. The temporary restraining order granted herein on February 9, 1949 is hereby dissolved.

/s/ WILLIAM C. COLEMAN,
Chief Judge,
U. S. District Court.

[fol. 5743] In United States Court of Appeals for the District of Columbia Circuit

Exhibit "B"—To Petition For Rehearing—Filed July 18, 1951

In the United States District Court for the District of Maryland—

Civil No. 5253

Pennsylvania Water & Power Company, *Plaintiff*,
Pennsylvania Public Utility Commission,
Plaintiff-Intervenor

v.

Consolidated Gas Electric Light and Power Company of Baltimore and Safe Harbor Water Power Corporation,
Defendants,

Public Service Commission of Maryland, *Defendant-Intervenor*

Judgment

This action having come on for hearing on April 20, 1951 on motion of plaintiffs Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission for summary judgment declaring that the agreement between Pennsylvania Water & Power Company, Consolidated Gas Electric Light and Power Company of Baltimore and Safe Harbor Water Power Corporation dated June 1, 1931, and the agreements supplementary thereto dated August 1, 1932 and November 22, 1939, are illegal and invalid under the antitrust laws and the laws of Pennsylvania covering public utilities and are contrary to public policy and *ultra vires* Safe Harbor Water Power Corporation, and coun-[fol. 5743] sel for the parties having been heard, and due consideration having been given, and the Court having filed its memorandum opinion herein dated May 3rd, 1951, it is this 21st day of May, 1951, by the United States District Court for the District of Maryland,

Ordered and Adjudged, that:

1. Plaintiffs' motion for summary judgment is hereby granted; and

2. The agreement between Pennsylvania Water & Power Company, Consolidated Gas Electric Light and Power Company of Baltimore and Safe Harbor Water Power Corporation dated June 1, 1931, and the agreements supplementary thereto dated August 1, 1932 and November 22, 1939, are on their face invalid and illegal; said agreements contain restrictive and other provisions which are *per se* in violation of the Sherman Anti-Trust Act; said agreements violate the laws of Pennsylvania governing public utilities and are therefore illegal; said agreements are contrary to public policy, and the common law and therefore invalid; and said agreements place the internal control of Safe Harbor Water Power Corporation in the hands of others and destroy the corporate virility of said Corporation and are therefore *ultra vires* and invalid; and accordingly said agreements are hereby declared to be void and of no effect.

/s/ Albert V. Bryan,
United States District Judge,
Specially Designated to Sit in a District
Court for the District of Maryland.

Norfolk, Va.

Filed 22nd May 1951.

(File endorsement omitted)

UNITED STATES COURT OF APPEALS

(Title omitted)

[File endorsement omitted]

Before: Wilbur K. Miller, Bazelon and Fahy, Circuit Judges.

Order Denying Petitions for Rehearing—Filed September 6, 1951

On consideration of the petitions for rehearing filed in the above-entitled cases and of the intervenors' answer thereto, it is

ORDERED by the Court that the petitions for rehearing be, and they are hereby, denied.

Dated: September 6, 1951.

Per Curiam.

Circuit Judge Wilbur K. Miller is of the opinion that the [fol. 5745-5833] petitions for rehearing should be granted.

[fol. 5834] SUPREME COURT OF THE UNITED STATES

October Term, 1951

No.

PENNSYLVANIA WATER & POWER COMPANY AND SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, *Petitioners*,

v.

FEDERAL POWER COMMISSION, and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND, INTERVENORS, *Respondents*

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties in the above entitled cause that:

For the purpose of the petition for a writ of certiorari, and in the event the petition be granted, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

1. Joint Appendix, Vols. 1 to 15, inclusive, Docketed September 19, 1950, as printed for use in the court below.

2. Index to Joint Appendix (1 volume), Docketed September 19, 1950, as printed for use in the court below.

3. Appendix to Petitioners' brief, Docketed September 19, 1950, as printed for use in the court below.

4. Supplemental Appendix to Petitioners' brief, Docketed September 19, 1950, as printed for use in the court below.

5. Appendix attached to Petitioners' motion to postpone date of oral argument and to postpone time for filing reply brief, Docketed November 21, 1950.

6. Exhibit to Petitioners' motion to set aside order of the Federal Power Commission and for further or alternative relief, Docketed December 29, 1950.

[fol. 5835] 7. Petitioners' partial reply to objection to motion to set aside orders of the Federal Power Commission, Docketed January 15, 1951.

8. Exhibit to Petitioners' motion for leave to file a supplemental brief and for further relief, Docketed May 8, 1951.

9. Opinion by Circuit Judge Bazelon, Circuit Judge Miller dissenting, Docketed July 3, 1951.

10. Judgment affirming orders of the Federal Power Commission, Docketed July 3, 1951.

11. Per Curiam order directing Clerk to file memorandum decision of United States District Court for the District of Maryland and denying motion of Petitioners for leave to file supplemental brief and denying Petitioners' motion for oral hearing, Docketed July 6, 1951.

12. Exhibits A and B to Petitioners' petition for rehearing, Docketed July 18, 1951.

13. Order denying Petitioners' petition for rehearing, Docketed September 6, 1951.

IT IS FURTHER STIPULATED AND AGREED that any of the parties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

Counsel for Petitioners also stipulate that they will move in the United States Court of Appeals for the District of Columbia Circuit to have the original transcript of record (74 volumes), docketed in that court on June 2, 1949, sent to the Supreme Court.

(Sgd.) Raymond Sparks, Counsel for Petitioners, Pennsylvania Water & Power Company and Susquehanna Transmission Company of Maryland. (Sgd.) Thomas M. Kerrigan, Ass't Counsel for Pennsylvania Pubulic Utility Commission. (Sgd.) Philip B. Perlman, Solicitor General of the United States. (Sgd.) Bradford Ross, General Counsel of Federal Power. (Sgd.) Alfred P. Ramsey, Counsel for Consolidated Gas Electric Light and Power Company of Baltimore, Intervenor-Respondent. (Sgd.) Charles D. Harris, Counsel for Public Service Commission of Maryland, Intervenor-Respondent.

September, 1951.

[fol. 81] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Oct. 4, 1951, Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10236

PENNSYLVANIA WATER & POWER COMPANY, a Corporation, and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, a Corporation, Petitioners,

v.

FEDERAL POWER COMMISSION, Respondent

No. 10239

PENNSYLVANIA PUBLIC UTILITY COMMISSION, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent

No. 10531

PENNSYLVANIA WATER & POWER COMPANY, a Corporation, and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND, a Corporation, Petitioners,

v.

FEDERAL POWER COMMISSION, Respondent

On Petition for Review of Orders of the Federal Power Commission and on Motions to Set Aside Orders of the Federal Power Commission.

Dissenting Opinion by Circuit Judge Wilbur K. Miller to Opinion of Court Filed July 3, 1951

Filed October 4, 1951

WILBUR K. MILLER, Circuit Judge, *dissenting*: It is my view that this court should have granted petitioners' motions to annul the rate reduction orders of the Federal

Power Commission. The decision of the United States Court of Appeals for the Fourth Circuit, which held null and void the contractual arrangement between Pennsylvania Water & Power Company and Consolidated Gas [fol. 82] Electric Light and Power Company of Baltimore, to which the orders were intended to apply prospectively, imperatively required that the case before us be remanded to the Commission to work out with the utilities some different plan for interchange of energy which would not violate any state or federal law and which would not be contrary to public policy. This should have been done because the Commission's orders stood in a vacuum after the Fourth Circuit held the contract invalid; the only service to which they can have application may not lawfully be continued.

But the Commission has ordered the two companies to continue to observe and be governed by all the provisions of the old contract which are "in and of themselves lawful," —a qualification which overlooks the fact that the Fourth Circuit condemned the contract in its entirety. And the majority of this court apparently hold that the Power Commission has authority to cause the *whole* contract to remain in effect, since they conclude that federal anti-trust laws do not apply to utilities regulated under Part II of the Federal Power Act. Relying on that theory, my brethren say,

> "The motions to set aside or to remand the Commission's orders on the basis of the Fourth Circuit's decision and the other points referred to above are denied."

It is thus clear that, despite the voluminous record in this case,[1] the numerous and sometimes lengthy briefs, and three days of oral argument, the basic issue is a simple one. Has the Federal Power Commission authority to order a combination of these two utilities under terms and conditions which, if arranged by private contract between them,

[1] The Power Commission filed with us a transcript in 75 volumes containing an aggregate of 26,876 pages. Appendices prepared by the parties abbreviated that bulk to 17 volumes containing 5,338 printed pages.

would clearly violate the federal anti-trust laws and the public utility laws of Pennsylvania? If the Commission has such power, the majority have correctly denied the motions to annul and remand. If not, then those motions should have been granted. Before discussing what I regard as the basic question, it may be well to review somewhat in detail the proceeding before the Power Commission and the litigation in the Fourth Circuit.

I

The Commission instituted in September, 1944, an investigation of the rates and charges of Penn Water, following which it entered an order on January 5, 1949, requiring a large reduction in Penn Water's annual revenue. The major portion of the reduction was allocated to Consolidated; indeed, the reduction ordered in Penn Water's charges against that company exceeded by approximately $500,000 the sum which Consolidated had paid Penn Water during the "test year" of 1946. The Commission interpreted the 1931 contract as entitling Consolidated to all Penn Water's energy except that required to meet its firm commitments to other customers; as a result of that interpretation the Commission concluded that very substantial sales by Penn Water to others had really been for the account of Consolidated, and allocated the reduction accordingly.

The rate order was accompanied by a lengthy opinion which makes it clear that the Commission assumed the [fol. 83] continuance of the 1931 contract and based its order, which was to operate prospectively, upon the relationship created by that instrument as it construed it.

For example: (a) The Commission's jurisdictional findings as to the use of Penn Water's facilities for the transmission of electric energy at wholesale in interstate commerce were based upon the assumption that the method of operation required by the contract of 1931 would continue. (b) The allocation of cost of service which the Commission made was premised upon its interpretation of Consolidated's entitlements and Penn Water's obligations under the 1931 contract. (c) The rate of return which the Commission allowed Penn Water was largely based upon the

financial security which the Commission thought Penn Water enjoyed under the 1931 contract. Moreover, the form of rate schedule later prescribed followed the residual-entitlement, specified-return formula of the 1931 contract.

Having observed the patent fact that the rate reduction order was based upon, and applied only to, the combination of facilities and interchange of energy set up by the 1931 contract, Penn Water applied to the Power Commission on January 28, 1949, for a rehearing. It sought to show that the order ought not to be premised upon a contractual relation which it regarded as illegal and which, if judicially found unlawful, could not continue to exist.

Among other things, Penn Water pointed out to the Commission that on December 20, 1948, after the record in the Commission's proceeding had been closed, it had terminated the 1931 contract by notice to Consolidated; and that it had sued Consolidated in the United States District Court for the District of Maryland for a declaration that the contract was invalid and unenforceable.[2] Apparently this was

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[2] In the course of its application for rehearing, Penn Water stated to the Commission:

> "(c) Since the record in the proceeding has been closed the purported contract referred to as supplemented, has been terminated by notice dated December 20, 1948; and if given the opportunity on rehearing Petitioners hereby offer to prove:
>
> "(i) The fact of such termination;
>
> "(ii) The contract was null, void, and unenforceable because the basic agreements were made at a time when Penn Water and Baltimore Company [Consolidated] were affiliated through substantial ownership by Baltimore Company of Penn Water stock and by interlocking directors and officers; the basic agreements were never approved or ratified by the stockholders of Penn Water; the effect of Articles IV and V of the supplemental agreement of June 1, 1931, particularly as construed in practice by Baltimore Company, made the contract *ultra vires* and contrary to public policy; and such supplemental agreement constituted an agreement

[fol. 84] the first time the Federal Power Commission had been officially informed that Penn Water had given notice of termination of what the Commission calls the "system foundation contracts," and that Penn Water considered them violative of the anti-trust laws and the utility laws of Pennsylvania and had sued for a declaration to that effect.

On February 26, 1949, the Power Commission denied the application for rehearing and filed an opinion in response to it, in the course of which it said:

". . . If there are questions as to the legality of the foundation contracts which are in litigation, as Respondents' application for rehearing indicates, the validity of our order is not dependent upon the decision of those questions. In our opinion and order *we took care to leave the continuation of the operation of the integrated and interconnected system*[3] *in full*

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in unreasonable restraint of trade and in unreasonable restriction of competition in the generation and sale of electrical services, and unreasonably limited the output of electrical energy contrary to the laws of the United States, including Section 1 of the Sherman Anti-trust Act of July 2, 1890 (15 U. S. C. 1946 ed. § 1; 26 Stat. 209, 50 Stat. 693), Section 5 of the Federal Trade Commission Act of September 26, 1914 (15 U. S. C. 1946 ed. § 45; 38 Stat. 719), and Section 10(h) of the Federal Power Act (16 U. S. C. 1946 ed. § 803(h); 41 Stat. 1068, 49 Stat. 842), and to the laws of Maryland and Pennsylvania.

"(iii) Baltimore Company committed material breaches of the contract which justified its termination; and

"(iv) The foregoing matters are now in litigation between Penn Water and Baltimore Company on complaint of Penn Water for declaratory and other relief, before the United States District Court for the District of Maryland, Civil Action No. 4179."

[3] This refers, of course, to the two sets of facilities as operated under the contract.

effect, merely changing the rates, as shown by our statement wherein we specifically stipulated that

"'The present arrangement whereby sales to Pennsylvania customers are made on a firm basis on definite rate schedules whereas Baltimore Company takes what is left and assures Respondents of the recovery of all proper operating expenses, depreciation, taxes and a fair return, is the most particable under the circumstances. *That arrangement will, therefore, be continued* with, however, such modifications as are necessary to accomplish the reductions mentioned above to Pennsylvania Power & Light, Philadelphia Company, Metropolitan Company and Baltimore Company.'" (My emphasis.)

Later in 1949—on October 27—the Commission prescribed a rate schedule for Penn Water's service to Consolidated which was designed to effectuate the reduction in Penn Water's revenue which it had ordered on January 5. The last paragraph of the October order is as follows:

"The foregoing provisions supersede only the rates and charges heretofore made, demanded, collected or assessed against Baltimore Company by Penn Water and Transmission Company. All other provisions of the aforementioned contracts, in and of themselves lawful prescribing or defining the power, energy and transmission services to be furnished, or any classification, practice, regulation or rule affecting such services, which several provisions are incorporated herein by reference, shall be observed and be in force."

The revenue reduction order of January 5, 1949, and the rate order of October 27, 1949, are those which this court was asked to review.

II

While the proceeding before the Power Commission, which has just been described, was in progress, the litigation in the Fourth Circuit began. As of June 1, 1931, Penn [fol. 85] Water and Consolidated, which were then under common dominance, had drastically amended a previously existing contract between them so as to form a combination

of their utility facilities under terms which made Penn Water a virtual vassal of Consolidated. Fifteen years later the two corporations ceased to be under common control and thereafter each was managed independently. But the basic contract of 1931, burdensome and restrictive as to the Pennsylvania company, not only continued to define and govern the relationship between the two utilities, but by its terms was to endure until 1980,—a bleak prospect indeed for Penn Water.

Due to differences and disputes which developed, Consolidated invoked the arbitration provisions of the contract on September 1, 1948. Shortly thereafter, Penn Water instituted suit in the United States District Court at Baltimore, asking that the arbitration provisions be declared unenforceable and that Consolidated be enjoined from proceeding thereunder. It gave notice of termination to Consolidated and in an amended complaint asked that the 1931 agreement be struck down in its entirety.

Thereupon Consolidated applied to the District Court for a restraining order and on February 9, 1949, the court restrained Penn Water, pending final determination of the issues, from doing anything in respect to the generation, transmission and disposition of power covered by the 1931 agreement in any manner different from the procedure theretofore followed in the performance of the contract. The District Court filed an opinion [4] on February 29, 1950, declaring the 1931 contract valid, and directing arbitration to proceed.

Penn Water appealed to the United States Court of Appeals for the Fourth Circuit and that court, on September 30, 1950, handed down an exhaustive opinion [5] reversing the judgment of the District Court. The appellate court held the 1931 contract invalid as contrary to public policy and as violative of the Sherman and Clayton Acts and the

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[4] *Pennsylvania Water & Power Co.* v. *Consolidated Gas Electric Light & Power Co.*, 89 F. Supp. 452.

[5] *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. (2d) 552.

public utility laws of Pennsylvania. In the course of the opinion, the Fourth Circuit said (at page 568):

> ". . . It may well be, although the *present arrangement* between the Maryland and Pennsylvania utilities is invalid for the reasons set forth, that an interconnection of facilities and an interchange of electrical energy between them may be continued by some method that would meet with the approval of the appropriate regulatory authority and will not offend either the anti-trust laws or the utility laws of Pennsylvania." (Emphasis supplied.)

Consolidated's petition for *certiorari* was denied by the Supreme Court on December 11, 1950,[6] as a result of which the case went back to the District Court for entry of a declaratory judgment in accordance with the opinion of the Court of Appeals for the Fourth Circuit. After the remand, a controversy arose in the District Court as to [fol. 86] whether the invalidation of the 1931 agreement had revived an agreement of 1927 between the parties for the interstate sale and delivery of electric energy so that Consolidated was enttiled to continued deliveries by Penn Water, in accordance with the terms set forth therein, regardless of the invalidity of the amendatory contract of 1931. In response to a motion by Penn Water that the Fourth Circuit interpret its mandate and settle the controversy, that court delivered a second opinion on January 10, 1951.[7]

The court held the earlier agreement of 1927 was not revived when the amendatory contract of 1931 was declared illegal, and reiterated in unmistakeable terms its former holding that the 1931 contract was invalid in its entirety. In the course of the opinion, the Fourth Circuit said (186 F.

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[6] *Consolidated Gas Electric & Power Co.* v. *Pennsylvania Water & Power Co.* and *Hessey et al., Constituting the Public Service Commission of Maryland* v. *Pennsylvania Water & Power Co.* (two cases), 340 U. S. 906.

[7] *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 186 F. (2d) 934.

(2d) at 937) that by entering into the amendatory contract

"... Penn Water gave up its independent status as a producer and seller of electric energy and subjected itself so completely to the dominance of Consolidated as to violate the controlling statutes and *hence the 1931 agreement must be stricken down.*

"... Here the prior contract has been merged in and its nature changed by the subsequent unlawful agreement, and as so changed, it has resulted in *an unlawful relationship which has continued for twenty years.* When the illegality of such relationship is declared, it is idle to contend that the court can withdraw the original contract from the illegal relationship and give validity, certainly after it has been buried therein for so long a period. *It must perish along with the relationship* of which it has been made an inseparable part.

* * * * * * *

"Throughout the trial of this case and in the argument of the pending motion, Penn Water has reiterated its desire to continue to supply electric energy to Consolidated; and in view of the close relationship between the parties, the existence of interconnecting equipment and the control over its rates by the regulatory bodies, there is no reason to fear that the interests of consumers of electricity in Maryland will suffer through *the invalidation of the existing contract* between the two utilities.

"The District Court should issue a declaratory judgment (1) setting aside its judgment and order of March 18, 1950; (2) *declaring that the agreements of December 31, 1927, June 1, 1931 and September 29, 1939 are void and of no effect;* and (3) dissolving the restraining order of February 9, 1949." (Emphasis supplied.)

Presumably the District Court at Baltimore then entered a judgment declaring the agreements between Penn Water and Consolidated to be void and of no effect, as it had been directed to do. There was no equivocation or limitation in the Fourth Circuit's directive. It did not simply hold

void the restrictive provisions, but condemned the 1931 agreement in its entirety. This was obviously because the [fol. 87] court considered that the whole arrangement depended upon the restrictions which fettered Penn Water and that the paragraphs containing the restrictions, therefore, were not severable from the remainder of the contract. This appears from the following excerpt from the Fourth Circuit's opinion (186 F. 2d) at 936):

> "The 1931 agreement, on the other hand, provided that Consolidated should be entitled to all the electric capacity and energy available to Penn Water and not otherwise disposed of in the performance of existing contracts, and in consideration thereof, Consolidated agreed to pay Penn Water an amount equal to its operating expenses, a specified rate of return on existing facilities, and on the cost of new facilities less depreciation, and Consolidated was allowed a credit for the amount of the sales of energy by Penn Water to other persons. Closely associated with these provisions were the illegal restrictions on the future activities of Penn Water which resulted in the invalidation of the whole contract. Therein Penn Water was required to obtain the approval of Consolidated before entering into any agreement for the sale or purchase of electric power and energy and to obtain the approval of Consolidated before making any investment or disposing of its property having a value in excess of $50,000. These restrictive conditions were included in order to safeguard Consolidated in the performance of its promises and it is conceded that without them the contract would have been impracticable and would not have been made."

Although a final judgment of a court of competent jurisdiction had thus invalidated the entire contract between Penn Water and Consolidated, the Federal Power Commission still regarded it as desirable and in the public interest that the facilities of the two companies be operated as one integrated and interconnected system. Being of that opinion, the Commission was understandably anxious that the co-operative use of facilities and interchange of energy be continued. I think it should have called the parties in and

required them to work out immediately a new contract in conventional form which would accord with the opinions of the Court of Appeals for the Fourth Circuit. The Commission thought, however, that the Fourth Circuit meant only to condemn the two paragraphs of the 1931 agreement which prohibited Penn Water from selling or buying energy and from increasing or reducing its plant investment without Consolidated's consent. It reasoned that it could require the continuance of the old contract if those paragraphs were eliminated. This would leave in effect the contractual definition of Consolidated's residual entitlements and the residual payment type of rate. But the Fourth Circuit said those provisions were so closely associated with the illegal restrictions on the future activities of Penn Water that the whole contract was invalid. The court's opinions make abundantly clear its intention to strike down the entire arrangement,—not just the restrictive provisions.

It is significant that Penn Water and Consolidated conceded that, without the unlawful restraints on the former, the 1931 contract would have been impracticable and would not have been made. That was an admission that the restrictions and the remainder of the contract were so "closely associated" that illegality of the restrictions resulted in complete invalidity. Even if the unlawful paragraphs of the agreement were severable, the remaining provisions [fol. 88] would be incompatible with the Fourth Circuit's decision because under them free and unrestrained competition would still be impossible. Welding the facilities of the two companies into one integrated system—the Commission's objective—is not conducive to competition.

III

After the "system foundation contracts" had been held null and void, Penn Water entered a motion in this court on December 29, 1950, asking that we

> ". . . set aside, annul and dismiss the orders of the Commission sought to be reviewed in these proceedings, or, in the alternative, remand these proceedings to the Commission with instructions to annul and set aside its orders herein sought to be reviewed . . ."

The Pennsylvania Public Utility Commission also moved this court on December 29, 1950,

> "To annul and dismiss the orders of the Federal Power Commission sought to be reviewed in Case No. 10,239 on the ground that the decision of the United States Court of Appeals for the Fourth Circuit in *Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission* v. *Consolidated Gas Electric Light and Power Company of Baltimore and Public Service Commission of Maryland*, 184 F. 2d 552 (1950), *cert.* denied December 11, 1950, renders invalid, null, void and of no effect the orders of the Federal Power Commission and the proceedings before it pursuant to which said orders were issued."

The question presented by these motions was what I have called the basic issue: can the Federal Power Commission lawfully establish between Penn Water and Consolidated a relationship which constituted a violation of the anti-trust statutes when established by contract between them? One who considers that question should bear in mind three indisputable propositions: 1. Regulated industries are not *per se* exempt from the Sherman Act. 2. Part II of the Power Act does not give the Commission power to lift the ban of the anti-trust laws. 3. As repeals by implication are not favored, only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy. *Georgia* v. *Pennsylvania Railroad Company*, 324 U. S. 439; 456-7 (1945); *United States* v. *Borden Company*, 308 U. S. 188, 198 *et seq.* (1939).

In denying the motions and holding that the Commission has such power, the majority of the court necessarily first concluded that Part II of the Federal Power Act had impliedly repealed or superseded the anti-trust statutes so as to exempt from their prohibitions the combination between Penn Water and Consolidated which the Commission ordered to continue.

In order to show in bold relief the thinking of my brothers

of the majority which led them to that conclusion, I have skeletonized the pertinent portion of their opinion:

"The problem raised by the motions is one of the interrelation of two statutory schemes—each of which reflects different historical pressures and different con- [fol. 8] ceptions of the public interest. The Sherman Act and related laws represent an attempt to keep the channels of competition free so that prices and services are determined by the workings of a free market. . . . In marked contrast is a statute such as Part II of the Federal Power Act. It evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are monopolies because of public grant. . . .

"These contrasting objectives indicate that the anti-trust laws can have only limited application to industries regulated by specific statutes. . . .

". . . The net effect of what we have already said is that, though regulated industries are not *per se* exempt from the anti-trust laws and repeals by implication are not favored, the anti-trust laws are superseded by more specific regulatory statutes *to the extent* of the repugnancy between them . . . where a statute provides for comprehensive and detailed regulation of a particular industry, as do the Interstate Commerce Act and the Federal Power Act, there is, as we have indicated, only a limited area for application of anti-trust considerations to Commission decisions."

These generalities boil down to the thesis that Part II of the Federal Power Act is repugnant to the anti-trust laws and therefore supersedes them to the extent of the repugnancy; and that the repugnancy extends so far as to exempt from the anti-trust laws the combination of utilities ordered by the Commission which is otherwise clearly illegal under those statutes.

The majority do not point out with particularity the repugnancy upon which they rely. They seem to find it in the "contrasting objectives" of the anti-trust acts and

Part II of the Power Act, saying the first was designed to obtain the benefit of free competition, and the other to eliminate competition as having no place in the utility field and to substitute for it a regulatory agency. This being the only repugnancy suggested by the majority, their holding necessarily is that the anti-trust laws are superseded by Part II of the Power Act to the extent that the *objectives* of the two forms of legislation are in contrast. Let us see if there is really any repugnancy between the Sherman Act and Part II of the Power Act.

The first section of the former, which is 15 U. S. C. § 1, declares illegal every contract, combination or conspiracy in restraint of trade or commerce. The 1931 contract between Penn Water and Consolidated was held violative of that section.

Section 202, found in Part II of the Power Act, empowers the Commission to require the interconnection and co-ordination of the facilities of the two utilities. But neither that section nor any other section of Part II authorizes the Commission to require interconnection and co-ordination of facilities under terms and conditions which will result in a violation of the Sherman Act. The Commission can exercise its power under § 202 and under all of Part II without setting up an arrangement which is unlawful under anti-trust statutes. The Fourth Circuit intimated as much when it suggested that the interconnection of facilities and interchange of energy be continued "by [fol. 90] some method which would meet with the approval of the appropriate regulatory authority and will not offend either the anti-trust laws or the utility laws of Pennsylvania." The majority opinion does not suggest any reason why that cannot be done by the Commission.

Since the Power Commission can perform all its functions under Part II without creating a violation of the Sherman Act, there is no repugnancy between the two statutes, and no room for the court to say that Part II superseded the anti-trust statutes.

I have said, as did the Fourth Circuit, that neither Part I nor Part II of the Federal Power Act purports to suspend the anti-trust statutes with respect to licensees and utilities regulated thereunder. On the contrary, § 1 of the Sherman

Act is substantially repeated in § 10(h), found in Part I of the Power Act, 16 U. S. C. § 803(h), which is as follows:

> "Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

Penn Water is a licensee under Part I of the Act and so is subject to the prohibitions of § 10(h). The majority considers that the omission of that section from Part II not only repealed § 10(h) but also amounted to a repeal of the prohibitions of the Sherman Act as far as regulated companies are concerned. That amounts to saying that the anti-trust laws do not apply to any regulated industry unless their provisions are substantially repeated in the regulatory statute. Just the opposite is true: the anti-trust laws apply to regulated industries unless exemption therefrom is expressly provided in the regulatory statute, or must inevitably be implied from provisions of the regulatory act which are clearly repugnant to anti-trust prohibitions.

It must be noted, too, that Penn Water does not lose its status as a licensee under Part I simply because it is regulated also under Part II. It continues, nevertheless, to be a licensee and so continues to be forbidden by § 10(h) to engage in the combinations or arrangements made illegal thereby. It follows that, when the Commission required Penn Water and Consolidated to remain in the combination which had been condemned by the courts, it not only did not act under the authority of Part II which gives it no such power, but also affirmatively violated § 10(h) of its own basic act.

The majority opinion says, however, that when a Part I licensee is also a Part II company, as Penn Water is, it is no longer subject to the anti-trust provisions of § 10(h), simply because the language of that section does not appear in Part II. Then the notion that § 10(h) was repealed by Part II is thus stated in the opinion:

> ". . . The prohibitions of § 10(h) would apply to a licensee which is also regulated under Part II only to

the extent that the prior statute is not repealed by the clear repugnancy between it and the later statute."

I suppose the court meant to say that Part II is clearly repugnant to § 10(h) because it does not contain similar language and therefore repealed that section by implication. But Part II is not repugnant to § 10(h) for the same reasons that it is not repugnant to the anti-trust laws: it is [fol. 91] not necessary for the Commission to cause a violation of § 10(h) in order fully to exercise its regulatory power under Part II over a Part I licensee which is subject to Part II regulation.

One other phase of the portion of the court's opinion which denies the motions remains to be noticed. It is that in which the court purports to give another reason for denying the motions to annul, in addition to the fallacious theory that the anti-trust laws do not apply to regulated industries. On examination, however, the additional ground is seen to rest upon the same erroneous idea. It is thus stated in the opinion:

"To grant petitioners' motions and set aside the order at this time would be to substitute antitrust criteria for those of the Federal Power Act, . . ."

By this the court meant that it would be improper to annul the Commission's orders on the mere ground that "a decision handed down in a suit between private parties under a non-controlling statute" had destroyed the only arrrangement to which they could possibly have application. If Penn Water "wishes," because of the Fourth Circuit's decision, to make some change in the old contractual arrangement which the Commission has ordered to be retained, the majority say the only thing it can do is to submit its proposed new arrangement. Then, after the Commission has disposed of the proposal, Penn Wafer can file a new petition for review if it feels aggrieved. That would be true if Penn Water wanted to change an existing *legal* arrangement.

The key error in the court's reasoning is revealed by its allusion to the decision of the Fourth Circuit as one "handed

down in a suit between private parties under a non-controlling statute." It shows that in assigning this additional reason for denying the motions to annul, the court is still assuming that the Commission can lawfully require these utilities to form a combination which they cannot legally form by their own contract.

I think I have shown sufficiently already that the Sherman Act *is* the controlling statute which the Commission is not empowered to override. That the judgment invalidating the existing arrangement was handed down in a suit between private parties is, of course, immaterial. It is binding on those private parties, yet this court has required them to disobey it. It has done so upon the erroneous idea that the Sherman Act has been superseded by Part II of the Federal Power Act and so is not the "controlling statute."

In the portion of the majority opinion now being discussed, the court says it is the existing "services and rates, reflecting underlying operations, which were the subject of the Commission's orders." The implication is that all the Commission has done is to prescribe rates for service actually being rendered; that if the rates are just and reasonable for that service, and if the Commission's findings in that respect are supported by substantial evidence, "our review is at an end." I suggest that the "underlying operations" were the subject of the Commission's orders and therein lies the vice in them. They did not deal with rates alone but ordered the contractual "underlying operations" to continue.

It is a boot-strap argument to say that, because the Commission has power to prescribe rates for existing service so [fol. 92] long as it is being rendered, it can therefore require continued rendition of the service no matter if it is unlawful.

For the reasons given, I think the motions to annul the Commission's order should have been granted, and so I dissent. My brothers of the majority, having denied the motions, then proceeded to explore the merits of the rate reduction order and the implementing rate schedule which the Commission prescribed, and affirmed those orders. I dissent also from that action, as I think the orders should have

been set aside as improper. But I do not prolong this dissent by discussing the merits of the orders, as I think it perfectly clear that they should have been set aside as being without basis or applicability after the Fourth Circuit's judgment became final.

[fol. 93] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 428

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed February 4, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 94] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 429

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed February 4, 1952

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